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No. 90- ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

E.W. SCRIPPS COMPANY, THE KENTUCKY POST and AL SALVATO,

Petitioners,

v.

LOUIS A. BALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRUCE W. SANFORD
Counsel of Record
LEONARD H. FREIMAN
ANNE R. NOBLE
MATTHEW G. WEBER
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1500

RICHARD G. MEYER
DETERS, BENZINGER & LAVELLE
2701 Turkeyfoot Road
Covington, Kentucky 41017
(606) 341-1881

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

Whether the First and Fourteenth Amendments require the submission of special interrogatories to the jury in a public official libel trial so that it may identify each individual statement it finds to be false, defamatory and published with actual malice, and so that appellate courts can properly conduct the independent review of the verdict mandated by *Harte-Hanks Communications, Inc. v. Connaughton*, *Bose v. Consumers Union* and *New York Times v. Sullivan*.*

Whether an inference of common law malice combined with inadvertent error can constitute clear and convincing evidence that a newspaper's statements criticizing the performance of an elected county prosecutor were published with "actual malice."

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* Petitioner the E.W. Scripps Co. has no parent companies or partially-owned subsidiaries. Petitioner *The Kentucky Post* is published by Scripps Howard, Inc., a wholly-owned subsidiary of the E.W. Scripps Co.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Preliminary Statement	2
B. Statement of Facts	4
C. Procedural History	7
D. How the Federal Questions Were Presented	10
REASONS FOR GRANTING THE WRIT	11
A. The First and Fourteenth Amendments Require The Submission Of Special Interrogatories To The Jury In A Public Official Libel Trial So That It May Identify With Specificity Which Statements It Finds To Be False, Defamatory And Published With Actual Malice, And So That Appellate Courts Can Properly Conduct The Independent Review Of The Verdict Mandated By *Harte-Hanks Communications, Inc. v. Connaughton*, *Bose v. Consumers Union* And *New York Times v. Sullivan*	11
B. An Inference of Common Law Malice Combined With Inadvertent Error Cannot Constitute Clear And Convincing Evidence That A Newspaper's Statements Criticizing The Performance Of An Elected County Prosecutor Were Published With "Actual Malice"	19
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Albergo v. Reading Co., 372 F.2d 83 (3d Cir. 1966), *cert. denied*, 386 U.S. 983 (1967)	16
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	14
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967)	22
Bose Corp. v. Consumers Union, 466 U.S. 485 (1984)	17,19
Connick v. Myers, 461 U.S. 138 (1983)	2
Cruzan v. Director of Missouri Dep't of Health, 110 S. Ct. 2841 (1990)	27
Diesen v. Hessburg, 455 N.W.2d 446 (Minn.), *petition for cert. filed*, No. 90-1079 (Nov. 27, 1990)	26
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)	16
Freedman v. Maryland, 380 U.S. 51 (1965)	14
Garrison v. Louisiana, 379 U.S. 64 (1964)	22
Goldberg v. Kelly, 397 U.S. 254 (1970)	11
Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)	17,27
Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979)	11
Gregg v. Georgia, 428 U.S. 153 (1976)	14
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678 (1989)	*passim*
Hitchcock v. Dugger, 481 U.S. 393 (1987)	14
In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980)	11
Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986)	28
Malinski v. New York, 324 U.S. 401 (1945)	13
Mapp v. Ohio, 367 U.S. 643 (1961)	14
Mathews v. Eldridge, 424 U.S. 319 (1976)	13
McDowell v. Paiewonsky, 769 F.2d 942 (3d Cir. 1985)	23

Table of Authorities Continued

	Page
Mertens v. The Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 933 (1965)	16
New York Times v. Sullivan, 376 U.S. 254 (1964)	17
Newton v. National Broadcasting Company, Inc., 1990 U.S. App. LEXIS 15265 (9th Cir. 1990)	18
Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985)	12
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)	14
Price v. Viking Penguin, Inc., 676 F. Supp. 1501 (D. Minn. 1988), *aff'd*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990)	18
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	2
Rosenblatt v. Baer, 383 U.S. 75 (1966)	12
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)	13
St. Amant v. Thompson, 390 U.S. 727 (1968)	23
Skidmore v. Baltimore & O. R., 167 F.2d 54 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948)	12
Speiser v. Randall, 357 U.S. 513 (1958)	11,14
Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987)	*passim*
United States v. Carolene Products Co., 304 U.S. 144 (1938)	14
OTHER AUTHORITIES:	
U.S. Const. amend. I	1
U.S. Const. amend. XIV, § 1	1
28 U.S.C. § 1257(a)	1
Fed. R. Civ. P. 49	12
Ken. R. Civ. P. 49, 51(3)	10,12
S. Brill, *Trial By Jury* (1989)	15

Table of Authorities Continued

	Page
J. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968)	16
Libel on Trial: The Westmoreland and Sharon Cases (BNA Special Report 1985)	9
H.P. Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 518 (1970)	14
Note, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 Yale L.J. 483 (1965)	12
Note, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 Ariz. St. L.J. 297 (1986)	11,16
J.W. Parker, *Free Expression and the Function of the Jury*, 65 B.U.L. Rev. 483 (1985)	14,15
B.W. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* (1985)	18
E.R. Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253 (1920)	12
United States Department of Commerce, *County and City Data Book 1988* (May 1988)	6
United States Department of Justice, *Crime in the United States* (Aug. 5, 1990)	2
D. Wells, "Mapplethorpe Show Bumps Into A City's Legacy of Conformity," L.A. Times, Apr. 23, 1990, at § F, p.1	5
W. Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 Yale L.J. 296 (1926)	12

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioners, the E.W. Scripps Co., The Kentucky Post and Al Salvato, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Kentucky entered in this defamation action on November 29, 1990.

OPINIONS BELOW

The judgment of the Circuit Court for Campbell County, Kentucky is unpublished and is included in the Appendix ("App.") hereto. The opinion of the Court of Appeals for the Commonwealth of Kentucky is unpublished and is included in the Appendix hereto. The opinion of the Supreme Court of Kentucky has not yet been published and is included in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Kentucky reversing the decision of the Court of Appeals for the Commonwealth of Kentucky and affirming the judgment on the jury verdict entered in favor of the Respondent was entered on November 29, 1990. This Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Fourteenth Amendment, United States Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Preliminary Statement

In the United States today, a violent crime occurs once every 19 seconds. Department of Justice, *Crime in the United States* 6 (Aug. 5, 1990). The prosecution of criminals is, as this Court has recognized, a matter of paramount public interest: "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted. . . ." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). The performance of prosecutors, therefore, deserves the closest scrutiny. Consequently, because "the First Amendment's primary aim is the full protection of speech upon issues of public concern[,]" *Connick v. Myers*, 461 U.S. 138, 154 (1983), any judicial process which operates to punish speech on this issue must be reviewed with the utmost care.

A decade ago, editors and reporters employed by Petitioner *The Kentucky Post* ("the *Post*"), an afternoon newspaper of general circulation serving Northern Kentucky, began to hear disquieting suggestions from law enforcement officials and others that the professional performance of prosecutor Louis A. Ball ("Ball") left something to be desired. On November 17 and 19, 1984, after a three-month inquiry, the *Post* published a two-part series ("the series") examining the prosecutor's performance. The series, reported and written by Petitioner Al Salvato ("Salvato"), dealt with the full range of Ball's prosecutorial responsibilities, but focused primarily on his treatment of persistent felony offenders (PFO's), his reliance on plea bargaining to dispose of felony cases, and his working relationship with the police in Campbell County. Nearly half the material in the series was obtained from lengthy interviews Salvato conducted with Ball and the three assistant prosecutors in his office. The remainder of the material was drawn from public records and Salvato's interviews with dozens of area law enforcement officials, including police officers and judges. The series, although

critical, was presented in a point-counterpoint fashion, and included a sidebar story about Ball's professional background, which mentioned that he is "highly respected in Kentucky" among his fellow Commonwealth's Attorneys. App at. 42a; *see generally* App. at 31a-59a.

Less than a month after the series was published, Ball brought suit against the *Post*, in which he alleged that the entire series—as well as the editorials that preceded and followed it—was false and defamatory. On November 20, 1985, a Kentucky jury awarded Ball $175,000 in compensatory damages. That verdict was later reversed by the Kentucky Court of Appeals after its independent review of the record led it to the conclusion that Ball had failed to prove that any statement in either the series or the editorials was false or had been published with actual malice. App. at 23a.

On November 29, 1990, the Kentucky Supreme Court reversed the appellate court's ruling and reinstated the jury's verdict. Its opinion was based on the court's determination that an inference of common law malice—when combined with inadvertent error—clearly and convincingly established the *Post*'s "actual malice." App. at 11a. Whether this is what the jury intended cannot be known, because at trial, the court rejected the *Post*'s proffer of special interrogatories, which would have required the jury to identify in an organized and coherent fashion which specific statements, if any, it found to be false, defamatory, published with "actual malice," and the cause of actual injury to Ball. App. at 13a; 60a-73a.

The E.W. Scripps Co., *The Kentucky Post* and Al Salvato (collectively referred to as "Petitioners") respectfully request that this Court grant *certiorari* in this case for two reasons. First, special interrogatories should be required in libel suits brought by public officials to assist juries, focus and facilitate appellate review, and diminish the constitutionally untenable possibility that the expression of protected speech will be punished as it was in this case.

Second, *certiorari* should be granted because the decision of the Kentucky Supreme Court punishes a good faith, honest effort to examine a public official's performance, and, if left intact, will surely discourage such discussion in Kentucky.

B. Statement of Facts

The *Post*'s examination of the Campbell County Commonwealth's Attorney's office arose from the newspaper's conviction that it had a duty to help its readers appraise what appeared to be a growing rift between the Commonwealth Attorney and the police officers who handle felony cases in Campbell County. Tr. 289-90, 1048-53, 1069, 1081, 1083, 1092-93.[1] As Judith Clabes, Editor of the *Post*, would later testify:

> Our position was that the controversy itself was detrimental to the workings of the criminal justice system in Campbell County and that they needed to stop all this bickering. What we reported and what is clearly a purpose of the stories is not to make a judgment one way or another, but to shed light on this situation so the public could draw its own conclusion.

Tr. 321.

Editors at the *Post*, in fact, had been hearing since the early 1980's that police and other local officials were frustrated with what they characterized as Ball's listlessness as a prosecutor, his "absence of leadership," and the fact that, as *Post* Managing Editor Mike Phillips recalled at trial, people in the community did not perceive him as "being strong in the clutch when facing a really tough case. . . ." Tr. 1048, 1050, 1053.

The specific events provoking the series, however, began in 1984, when the Kentucky State Police launched an investigation of the Bellevue Police Department. That in-

[1] References to the trial transcript are denoted herein as "Tr."; references to other parts of the record are denoted as "R."

vestigation led to a Campbell County grand jury probe of police corruption. Tr. 1042-45. Two *Post* reporters, including Petitioner Salvato, covered both the State Police investigation and the grand jury proceedings. Although the final State Police report to the grand jury contained strong evidence of corruption, the grand jury did not return any indictments, but instead it issued several recommendations for changes in police operations. Tr. 1044-45. In an editorial of July 2, 1984, the *Post* criticized both the grand jury's recommendations and Ball's official role in the grand jury probe. App. at 28a–30a.

Complaints about Ball by members of the grand jury spurred the *Post*'s news staff to look at what appeared to be contradictory community sentiment about Ball. For although he had twice been elected without opposition to the Commonwealth Attorney's position, criticism abounded that he was not an effective prosecutor in a county plagued with a long history of criminal activity. Tr. 1045-53.[2] Rather than merely reporting police grumbling, editors at the *Post* assigned Salvato, one of their most knowledgeable and thorough reporters, to examine Ball's performance. Tr. 1048.[3]

For three months in the summer and fall of 1984, Salvato researched the matter. He reviewed and analyzed every felony file in the Campbell County Circuit Court for

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[2] Campbell County sits across the Ohio River from Cincinnati, Ohio, and includes the cities of Bellevue and Newport. The county has long had a reputation as the vice capital of the greater Cincinnati area. As the *Los Angeles Times* reported last year: "It used to be said that Cincinnatians went across the Ohio River to wide-open Newport, Ky. for their sins." D. Wells, "Mapplethorpe Show Bumps Into A City's Legacy Of Conformity," L.A. Times, Apr. 23, 1990, at § F, p.1.

[3] Salvato became familiar with the criminal justice system in Northern Kentucky when he wrote an award-winning newspaper series in 1982 about drug abuse in the area. This series received wide acclaim in the community, and was distributed to every primary and secondary school student in Northern Kentucky. It was during his investigation for this drug series that Salvato first heard reports of police dissatisfaction with Ball's performance of his official duties. Tr. 1034-39, 1149-50.

a five-year period and interviewed dozens of police and other law enforcement officials in Northern Kentucky. Tr. 380, 384-85, 398, 477, 623, 644-45, 1163, 1183, 1194-96. Salvato's work revealed that the Kenton County Commonwealth's Attorney's office, in contrast to Ball's office, took a ~~much~~ harder line with PFO's, relied less extensively on plea bargaining, and enjoyed better working relations with law enforcement officials. Tr. 445, 1059, 1069-70.* Salvato incorporated these findings into the series, and included a statistical and graphic comparison of the divergent records of the two Commonwealth's Attorneys' offices. App. at 31a-59a.

As part of his research, Salvato interviewed Ball on two separate occasions. Tr. 237, 634, 641-42. Prior to publication, Salvato advised Ball of the statistical and other data which his study had revealed and solicited his comments. Tr. 633, 640-42, 1106. Salvato also interviewed and incorporated into the articles extensive quotes from Ball's three assistants. Tr. 634, 1182. Major portions of the series were devoted to Ball's position. Tr. 240-54, 262, 642, 1056-59, 1074. Ball has acknowledged that he was correctly quoted throughout the series. Tr. 238-45, 262.

Shortly after publication of the series in November 1984, the *Post* published four letters to the editor which criticized the articles and lauded Ball's skills as a prosecutor. Tr. 1075, 1080, 1224-25. The *Post* also published a lengthy guest editorial by Robert Lilly, a professor of sociology at Northern Kentucky University who later testified for Ball at trial, in which the author impugned Salvato's research methods and data. Tr. 582. Finally, in an editorial published November 26, 1984, the *Post* presented both sides of the police/prosecutor controversy, urged both sides to be more understanding, and challenged both sides to improve their performance: "We call on [Ball] to set a high standard for police work in Campbell County, and we call on the police to meet it." App. at 62a.

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* Kenton County borders Campbell County to the west, and is demographically similar. *See* Department of Commerce, *County and City Data Book 1988* E-3 (May 1988); Tr. 323-24, 1055-56.

C. Procedural History

1. The Complaint

On December 18, 1984, Ball filed a libel lawsuit against Petitioners, alleging that both the series and the July 2, 1984 and November 26, 1984 editorials were false and defamatory. Ball's Complaint did not identify specific objectionable statements in the *Post* series. It was not until two months before trial—and then only pursuant to court order—that Ball identified 32 statements which he alleged to be actionable. R. 120-22.

Shortly thereafter, Petitioners filed a motion for summary judgment requesting that the court rule that none of the 32 statements was actionable as a matter of law, on any of four grounds: (1) that the statement was a protected statement of opinion; (2) that there was no genuine issue regarding the substantial truth of the statement; (3) that the statement was not defamatory in nature or was not defamatory of Ball; or (4) that there was no clear and convincing evidence that any allegedly false and defamatory statement was published with actual malice. R. 103-17; 194-97. That motion was denied without opinion by the trial court on November 8, 1985, just several days before the trial was set to begin. R. 248-49. Petitioners renewed their motion orally at the beginning of the trial, at which time they urged the court to eliminate some, if not all, of the 32 statements from consideration. R. 317-18. The trial court again denied the motion. R. 319. Consequently, the trial proceeded on both editorials and articles in full.

2. The Trial

The trial in this case lasted seven days. Early on, Petitioners moved for a mistrial when Ball's counsel introduced evidence of an insignificant misunderstanding between Salvato and a local high school principal in an attempt to portray Salvato as a drug dealer. Tr. 802-06.

Ball offered testimony from a Bellevue police officer that Salvato had been detained in 1982 at a high school football game on suspicion of drug abuse with high school girls. Tr. 802-03. In fact, Salvato had been at the game to conduct research for his award-winning series on drug use in Northern Kentucky. Tr. 1144-45; *see supra*, note 3. Police officers at the game briefly questioned him after a student, unaware that Salvato was a newspaper reporter, mistakenly lodged a report with her high school principal. Any confusion was immediately dispelled when Salvato identified himself as a reporter. Tr. 1146-48. Salvato was never arrested, nor, of course, was he selling drugs to anyone. Tr. 1148. The treatment of the incident by Ball's counsel nevertheless gave the jury the indelible impression that Salvato was the sort of slime who would sell drugs to children. Petitioners asked for a mistrial on grounds that this wholly baseless and outrageous suggestion was so inflammatory and prejudicial as to poison the entire proceedings. Tr. 806-07. The motion was denied.[5]

With this testimony, Ball's counsel concocted the preposterous theory that Salvato harbored ill will against the Bellevue police and that he somehow transferred this grudge to Ball when the prosecutor later "mishandled" the grand jury probe into corruption among Bellevue police.[6] Throughout the trial, counsel used this invention to create a suspicion about Salvato's motives, *i.e.*, that Sal-

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[5] The trial judge's decision left Ball's counsel with wide latitude to play out his invention before the jury—latitude the former prosecutor employed with gusto. Ball's counsel even began his closing argument by reminding jurors, with a misstatement of the evidence, that "the police in Bellevue said [Salvato] was trying to get some girls to go down behind the stadium and do dope with them." Tr. 1660.

[6] The truth is that, after the incident, Salvato enjoyed an excellent working relationship not only with the Bellevue Police Department, but specifically with its chief—the principal target of the State Police investigation and grand jury probe. Tr. 1032, 1038, 1294-95. There was, in fact, no competent evidence that the innocuous misunderstanding at the football game—one brought about by Salvato's own "under-cover" reportorial work and not by excessive zeal by the police—even angered Salvato, much less generated a grudge that he later transferred to Ball.

vato had a desire to "get" Lou Ball and used his series to do so. Conspicuously absent from this storyline was *any* competent evidence supporting either this manufactured "grudge" or a resulting calculated falsehood in the series.

At the conclusion of the trial, the court rejected jury instructions proposed by Petitioners which were based on the instructions devised to foster coherent jury deliberations in the *Westmoreland* and *Sharon* public official libel trials. R. 251-97.[7] Instead, the trial judge opted for two brief instructions which purportedly summarized the relevant law of libel. Tr. 1635; App. at 78a-79a. The court also rejected Petitioners' special jury interrogatories, which would have required the jury to identify in an organized, intelligible fashion which specific statements, if any, it found to be false *and* defamatory of Ball *and* whether those *particular* statements had been published with actual malice *and* were the cause of actual injury to Ball. Tr. 1603-35; App. at 64a-77a.[8]

3. The Proceedings Below.

On August 13, 1987, after an independent review of the entire record, the Kentucky Court of Appeals reversed the trial court's verdict for Ball on grounds that "there is no clear and convincing evidence that these articles were published with the requisite knowledge of falsity or reckless

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[7] *See Libel on Trial: The Westmoreland and Sharon Cases* (BNA Special Report 1985).

[8] At the close of Ball's case-in-chief, the trial court ruled that the allegedly defamatory statements in the editorials of July 2, 1984 and November 26, 1984 were, as a matter of law, nonactionable statements of opinion. Yet the court did not instruct the jury to disregard either Ball's testimony regarding the editorials, *see* Tr. 233, or the editorials themselves during deliberations. In fact, the trial court permitted the jury to consider the editorials as additional "evidence of malice" in the case. Tr. 1015-20. As a result, the jury may even have based its verdict on statements that had been determined to be nonactionable statements of opinion. This problem would have been obviated had special interrogatories been employed.

disregard for the truth necessary to remove them from constitutional protection." App. at 23a.[9]

Ball then sought and obtained discretionary review in the Kentucky Supreme Court. The parties first argued the case in June 1988, but a decision was postponed pending this Court's ruling in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678 (1989). Following *Connaughton*, the parties reargued the single question of the standard of appellate review required in libel cases involving allegations of actual malice. On November 29, 1990, the Kentucky Supreme Court reversed the Court of Appeals and reinstated the jury verdict. App. at 2a. In its opinion, the Kentucky Supreme Court refused to consider Petitioners' argument regarding the use of special interrogatories in libel lawsuits brought by public officials and wholly misapplied *Connaughton*.[10]

D. How the Federal Questions Were Presented.

Petitioners' constitutional due process argument that a trial court should be required to submit special interrogatories to the jury in a public official libel lawsuit was

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[9] Contrary to the Kentucky Supreme Court's characterization, the appellate panel that reversed the judgment for Ball was hardly "divided." *See* App. at 2a. Two members of the panel voted to reverse the judgment *in toto*, while the third member concurred with regard to every statement except *one*, and would have remanded for a retrial on that single statement. App. at 23a-24a. Had the jury been required to answer the special interrogatories proffered by Petitioners, the concurring and dissenting member of the panel would not have had to speculate as to what conclusions the jury reached regarding that one statement.

[10] In its opinion, the Kentucky Supreme Court sloughed aside the trial court's rejection of special interrogatories, stating curtly that Petitioners had not preserved this error in accordance with the requirements of Kentucky Rule of Civil Procedure 51(3). App. at 13a. Even a cursory review of the record in this case, however, shows that the court's characterization of Petitioners' efforts to preserve their objection simply is not correct. Indeed, Petitioners made use of not just one, but *all three* of the alternative methods provided by Civil Rule 51(3) for the preservation of an objection to a trial court's refusal to issue special interrogatories. Tr. 1603-05, 1610, 1631-35.

presented to the trial court in Petitioners' pre-trial brief and just prior to jury deliberations. R. 198-215; Tr. 1603-05, 1610. The federal constitutional requirement that a public official defamation plaintiff must present clear and convincing evidence of actual malice was presented to the trial court at the time Petitioners filed their first motion for summary judgment. R. 103-17. Petitioners pursued both arguments in the proceedings before the Kentucky Court of Appeals and the Kentucky Supreme Court.

REASONS FOR GRANTING THE WRIT

A. The First and Fourteenth Amendments Require The Submission Of Special Interrogatories To The Jury In A Public Official Libel Trial So That It May Identify Each Individual Statement It Finds To Be False, Defamatory And Published With Actual Malice, And So That Appellate Courts Can Properly Conduct The Independent Review Of The Verdict Mandated By *Harte-Hanks Communications, Inc. v. Connaughton*, *Bose v. Consumers Union* And *New York Times v. Sullivan*.

In an adversarial proceeding laced with constitutional considerations—such as a public official libel trial—due process, as well as the First Amendment, require that "the decisionmaker's conclusion . . . rest solely on the legal rules and evidence adduced at the hearing." *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Indeed, "[t]he primary value promoted by due process in factfinding procedures is 'to minimize the risk of erroneous decisions.' " *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 13 (1979), *quoted in In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1084 (3d Cir. 1980). *See Speiser v. Randall*, 357 U.S. 513, 524-25 (1958) (where an "interest of transcending value," such as speech, is involved, the "margin of error" inherent to the factfinding process in litigation should be reduced as much as possible through procedural safeguards). *See generally* Note, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 Ariz. St.

L.J. 297, 299-300 (1986). To reduce the "margin of error" inherent in the factfinding process of a public official libel lawsuit, the use of special interrogatories should be mandatory.[11]

As the United States Court of Appeals for the Second Circuit recognized nearly half a century ago: "juries, by means of general verdicts, can and often do nullify those substantive legal rules they dislike. . . ." *Skidmore v. Baltimore & O. R.*, 167 F.2d 54, 58-59 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948). "Juror nullification" appears to be increasingly common in libel lawsuits, where "evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff. . . ." *Ollman v. Evans*, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985). General verdicts confer "on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations." E.R. Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253, 261 (1920). *See Tavoulareas v. Piro*, 817 F.2d 762, 808-09 (D.C. Cir.) (R.B. Ginsburg, J., concurring) ("In the libel area particularly, it is not a large exaggeration to suggest that jurors 'can easily misunderstand more law in a minute than the judge can explain in an hour.' ") (citation omitted), *cert. denied*, 484 U.S. 870 (1987). *Cf. Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966) (it is for the judge to decide, at the first instance, whether a particular libel plaintiff is a public official, because "[s]uch a

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[11] Federal Rule of Civil Procedure 49(b), adopted in 1938, authorizes a "judge to order a jury to return . . . a general verdict with interrogatories in lieu of a traditional general verdict." Note, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 Yale L.J. 483 (1965). *See* W. Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 Yale L.J. 296, 298 (1926). Kentucky's rule regarding special interrogatories is identical to the federal rule. *See* Ken. R. Civ. P. 49.

course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the records and findings required for review of constitutional decisions"). *Certiorari* should be granted here because the trial court's refusal to utilize special interrogatories violated Petitioners' First Amendment and due process rights to a fair consideration and review of Ball's libel claim against them.[12]

1. In Libel Trials, The Procedural Safeguard Of Special Interrogatories Is Essential to Protect Speech.

"The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324

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[12] Fifteen years ago, this Court constructed a three-part balancing test for determining whether additional procedural safeguards were necessary for the protection of a particular constitutional interest. Under this approach, courts are to consider: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). All three of these factors counsel in favor of requiring special interrogatories in public official libel trials. First, the private interest at stake here—the fostering of robust discourse regarding the performance of public officials through the provision of fair trials for libel defendants—is compelling. *See infra* pages 16-18. Second, the risk of an erroneous deprivation of that interest is sizable. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (an erroneous verdict for the plaintiff in a libel suit is "most serious" because "[n]ot only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error . . . would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.") *See also infra* pages 18-19. The value of the proposed procedural safeguard is equally weighty. *See infra* pages 16-18. Finally, the fiscal or administrative burdens that the additional procedure suggested here would entail are relatively minor—if noticeable—because most judges are already familiar with special interrogatories.

U.S. 401, 414 (1945) (Frankfurter, J., concurring).[13] Indeed, as this Court has held: "the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." *Speiser*, 357 U.S. at 520-21. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that special procedures are proper in cases implicating the fundamental liberties articulated in the Bill of Rights). Detailed procedural safeguards are particularly appropriate where the interest at stake is protected speech, for "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." *Speiser*, 357 U.S. at 525. "Like the substantive rules themselves, insensitive procedures can 'chill' the right of free expression." H.P. Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 518, 519 (1970).

As both commentators and courts have recognized, "[c]ases involving free expression are precisely the type of cases that demand the use of general verdicts with interrogatories. . . ." J.W. Parker, *Free Expression and the*

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[13] This Court has not hesitated to require procedural safeguards where they are necessary to protect substantive constitutional rights. *See, e.g., in the libel area, Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (burden of proof on truth/falsity issue shifted to protect substantive first amendment rights recognized in *New York Times*); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (*New York Times* actual malice right protected by requirement that the "clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions."); *in the prior restraint area, Freedman v. Maryland*, 380 U.S. 51 (1965) (right to be free from censorship requires judicial, as opposed to merely administrative, determination before the imposition of a prior restraint); *in the Fourth Amendment area, Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (search and seizure rights guaranteed by Fourth Amendment prohibit states from introducing in criminal trials any evidence obtained in unconstitutional search and seizures); *and in the Eighth Amendment area, Hitchcock v. Dugger*, 481 U.S. 393 (1987) (right to be free from cruel and unusual punishment requires that judges allow juries to consider all relevant mitigating evidence in a death penalty case); *Gregg v. Georgia*, 428 U.S. 153 (1976) (right to be free from cruel and unusual punishment requires juries to make specific findings relating to both the crime and the defendant's character before imposing the death penalty).

Function of the Jury, 65 B.U.L. Rev. 483, 552 (1985), *quoted in Tavoulareas*, 817 F.2d at 808 n.3 (R.B. Ginsburg, J., concurring). "Special interrogatories assist the jury in reaching an intelligent verdict by bringing into focus the determinative facts which must be considered[,] [by] outlin[ing] the steps the jury should follow in reaching the general verdict[,] . . . [by] alleviat[ing] jurors' memory problems, and . . . [by] put[ting] psychological pressure on the jury to follow the law." Parker, *supra*, at 553.

Special interrogatories are especially crucial in cases involving actual malice, "a standard that may slip from the grasp of lay triers unfamiliar with legal concepts and perhaps unsympathetic to publishers who print statements shown to be false" because "[i]n a case governed by the *Sullivan* standard, separate questions on the issues of defamatory meaning, falsity, and actual malice would impel the jurors to advert to the framework within which the judge has instructed them to consider the case and could assist them to hold the distinct legal questions in clear and separate view. The inquiries thus may promote both comprehension and actual application of the governing first amendment law." *Tavoulareas*, 817 F.2d at 809 (R.B. Ginsburg, J., concurring).[14]

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[14] *See* S. Brill, "Inside the Jury Room at *The Washington Post* Libel Trial," *reprinted in* S. Brill, *Trial By Jury* 13-37 (1989) (describing how the jury in the *Tavoulareas* libel case misunderstood, misapplied and ignored the two hours of instructions given to them by United States District Judge Oliver Gasch, and consequently delivered a "compromise" general verdict); *see, e.g., id.* at 31-32 (emphasis supplied) (" 'The whole thing was,' recalls one juror, 'that none of us thought big Tavoulareas had *not* set up his son. It's just we couldn't prove it.' What if you had just been asked to decide whether the *Post* had been recklessly or deliberately inaccurate or unfair? this juror was asked: 'Oh, in that case, there's no way the plaintiff would have won. We all . . . conceded [the *Post*] hadn't done anything careless or on purpose.' ").

2. The Use of Special Interrogatories in Libel Trials Brought By Public Officials Will Abet Fairness to The Parties and Improve Both Jury Deliberations and Appellate Review.

Jury verdicts handed down in response to special interrogatories tendered under Federal Rule of Civil Procedure 49 (or its state law equivalents) have salutary practical effects, including affording "the reviewing court a sure foundation for approving the part of the trial uninfected by the error[,]" thus "leaving [any] retrial to specific separable issues." J. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 348 (1968). *See, e.g., Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851, 857-58 (2d Cir.) (reversing and remanding solely as to the damages verdict because the trial judge "wisely submitted this case to the jury with special interrogatories * * * and there is no reason why the jury's answers to the interrogatories establishing defendant's liability should be disturbed"), *cert. denied*, 382 U.S. 933 (1965). Without special interrogatories, "a court cannot determine how jurors decide[d] specific issues, which can necessitate a retrial of the entire case." Note, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 Ariz. St. L.J. 297, 308 (1986). *See, e.g., Albergo v. Reading Co.*, 372 F.2d 83, 86 (3d Cir. 1966) (reversing and remanding for new trial because "[w]here, as here, a general verdict may rest on either of two claims—one supported by the evidence and the other not—a judgment thereon must be reversed" and noting that "[a] new trial in this case would be unnecessary if the court below had employed either of the procedures authorized by Rule 49. . . ."), *cert. denied*, 386 U.S. 983 (1967). *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768 n.2 (1985) (White, J., concurring) ("If the plaintiff succeeds in proving a jury case of malice, it may be that the jury will be asked to bring in separate verdicts on falsity and malice. In that event, there could be a verdict in favor of the plaintiff on falsity, but against him on malice. There would be no judgment in his favor, but the verdict on falsity would be

a public one and would tend to set the record right and clear the plaintiff's name").

Additionally, the use of special interrogatories will aid appellate courts immeasurably in the mandated "review of the entire record" of public official libel cases. *See New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). For example, this Court's independent review in *Connaughton* was simplified by virtue of the special interrogatories that had been submitted to the trial jury. *See* 109 S. Ct. at 2697; *see also Bose Corp. v. Consumers Union*, 466 U.S. 485, 518 n.2 (1984) (Rehnquist, J., dissenting) ("It is notable . . . that *New York Times* came to this Court from a state court after a jury trial, and thus presented the strongest case for independent factfinding by this Court. The factfinding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the factfinding process engaged in by a trial judge who makes written findings . . ."). This Court and others have commented on the difficulty of conducting meaningful independent review of libel issues without the aid of special interrogatories. *See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) ("when 'it is impossible to know, *in view of the general verdict returned*' whether the jury imposed liability on a permissible or impermissible ground 'the judgment must be reversed and the case remanded' ") (emphasis added; citations omitted).

From the beginning, members of this Court have expressed concern that, because of its "elusive" quality, the term "actual malice" can lead to juror confusion. *See New York Times*, 376 U.S. at 302 n.4 (Goldberg, J., concurring). *See also id.* at n.2 ("The requirement of proving actual malice . . . may, in the mind of the jury, add little to the requirement of proving falsity. . . ."). Thus, as then United States District Judge Abraham Sofaer noted in a report to the Federal Judicial Center and the 1985 Judicial Conference of the Circuit Court for the District of Columbia, the reason he employed *seriatim* verdicts in the *Sharon*

case "was that the jury was thereby encouraged to treat the issues of falsity and actual malice as separate matters, with separate legal standards and evidence."[13]

3. Lacking Guidance From Special Interrogatories, The Kentucky Supreme Court Merged the Separate Concepts of Malice And Falsity And Reinstated A Verdict That Bore No Relationship To The Facts Presented At Trial.

As a matter of settled constitutional law, "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." *Tavoulareas*, 817 F.2d at 794 (emphasis supplied by the court). *Accord Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1513 (D. Minn. 1988), *aff'd*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990). *See Newton v. National Broadcasting Company, Inc.*, 1990 U.S. App. LEXIS 15265 (9th Cir. 1990) (public officials and public figures "cannot recover damages for defamation without clear and convincing proof that a false 'statement was made with "actual malice"—that is, with knowledge that *it* was false or with reckless disregard of whether *it* was false or not' ") (emphasis added; citations and footnote omitted). Yet, the jury below was permitted, through the cloak of a general verdict, to shroud its "actual malice" determination, which rested on a confused combination of Salvato's supposed "ill will" and unrelated factual errors. The Kentucky Supreme Court then refused to examine that verdict's suspect underpinnings, and instead pledged blind allegiance to the impenetrable general verdict itself.

Special interrogatories would have forestalled this defective approach, because they would have forced the jury to specify which statements—if any—the jurors found to be false and defamatory, published with actual malice and the cause of actual injury. The *lack* of special interrogatories therefore aided the Kentucky Supreme Court in its

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[13] *See* B.W. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* 10 (1985).

determination to reduce the scope of its review to a *single* inquiry: whether there was *any* supporting evidence to support Ball's theory of the case. For, according to the court, that inquiry already had been resolved by the jury, whose general verdict for Ball, the court assumed, meant that it must have accepted all of Ball's evidence and every one of his counsel's arguments. *See* App. at 8a ("*We accept the jury's finding as to disputed facts when there is supporting evidence because we claim no superior ability to divine the truth by reason of judicial office* . . .") (emphasis added). Thus, with a single sentence, the Kentucky Supreme Court dispensed entirely with an independent review of any of the evidence or arguments presented by Petitioners, in violation of both their First Amendment and due process rights. There is not one mention in the entire opinion of any factual evidence submitted by Petitioners, a deliberate omission that distorts the record and the context in which Ball's evidence and arguments were presented, virtually to the point of unrecognizability. Special interrogatories should be made mandatory because fair trials—and meaningful appellate review—of public official libel cases cannot, as this case amply demonstrates, be assured in their absence.

B. An Inference Of Common Law Malice Combined With Inadvertent Error Cannot Constitute Clear And Convincing Evidence That Statements Criticizing The Performance Of A County Prosecutor Were Published With "Actual Malice."

In a trio of cases beginning with the landmark *New York Times* decision, this Court has required federal and state appellate courts to "make an independent examination of the whole record" in libel lawsuits brought by public officials where judgment has been entered in the official's favor. Under this trilogy, appellate courts have an affirmative obligation to "decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511. In the proceedings below, the Ken-

tucky Supreme Court, rather than independently revewing all the evidence, simply disregarded any evidence other than Ball's. *See* App. at 8a, 10a.

1. The Kentucky Supreme Court Employed An Improper Standard of Appellate Review.

The Kentucky Supreme Court's description of the statements it found to be false is indicative of the constitutionally insufficient review that it conducted. For, although an appellate court may review "credibility determinations" under the "clearly erroneous standard," *Connaughton* requires "the reviewing court. . . [to] '*examine for* [*itself*] the statements in issue *and the circumstances under which they were made*. . . .'" 109 S. Ct. at 2696 (emphasis added). No such review was conducted below. Instead, the Kentucky Supreme Court disregarded the unequivocal directions in *Connaughton* and employed the "clearly erroneous" standard of review applicable to cases in which fundamental liberties are not at stake. App. at 10a.

Thus, the court below accepted without question or independent analysis "the underlying evidence which Ball cites as proof substantiating actual malice" and the "statements in the news articles which Ball specifically states to be false and defamatory." App. at 6a. On the basis of those arbitrary assumptions—and without any attempt to independently determine whether any of the specific "statements" which Ball "states to be false and defamatory" were published with knowledge of *their* falsity or reckless disregard for *their* truth—the court below held that: "considering the plaintiff's evidence regarding factual circumstances to prove malice and plaintiff's proof that *statements* in the article were false and defamatory, . . . we find, with 'convincing clarity' a 'high degree of awareness of probable falsity.'" App. at 10a (emphasis added; citations omitted).

For example, the Kentucky Supreme Court noted that Salvato "admitted miscalculating his statistics on conviction rates when transposing the numbers into percentages," but failed to consider testimony showing that this

transposition was inadvertent, and that it affected only *two* of the groups of percentages Salvato included in his several illustrative charts. App. at 6a; *see* App. at 40a-41a. Further, the court did not consider the fact that, in relation to the overall report, the transposition was immaterial or that, in view of Salvato's three-month review of documents and records, some such minor mistakes were hardly surprising.

The court also embraced Ball's hypothesis that the series' statements regarding his office's "greater propensity to dismiss persistent felony charges in exchange for a guilty plea as compared to Kenton County" were false because "[t]he reporter knew the plea bargaining method was different so the statistics could not be compared." App. at 7a. Yet, the court ignored testimony which showed that Salvato discussed his statistical calculations with Ball before the story was published and that Ball had not denied the validity of the comparisons during those discussions. Importantly, the court further disregarded the plain language of the series itself, which both explained the different statistical methods and included Ball's statements regarding the statistics in its text. App. at 32a - 41a. Likewise, the court adopted Ball's theory that statements regarding his decision to bring "a convicted felon to his office and [to] coerce[ ] him by threat of a persistent felony charge to plead out" were false and defamatory because "[a] check with this person's attorney would have proved this false." App. at 7a. Yet, the court ignored testimony which showed that the only portion of the statement to which Ball objected—and, indeed, the only factual discrepancy described by the attorney—was the *location* of the alleged coercion. Tr. 450-51. Under similar reasoning, a convicted murderer could recover for libel if a newspaper incorrectly identified the site of his crime as a bedroom, when the murder in fact had taken place in the kitchen.

Most shockingly, the court made the illogical (and unsupportable) assertion that "Salvato interviewed only a *few persons* hostile to Ball as background material for his news articles, deliberately choosing not to interview those who

could contradict their claims." App. at 5a (emphasis added). The record clearly demonstrates, however, that Salvato interviewed *42* separate individuals for the series, *including Ball himself and all three of his top assistants*, and that Salvato quoted more than half of these people in his stories, all of them accurately. Tr. 238-45, 262.

In short, the Kentucky Supreme Court's examination of "the whole record" was nothing of the kind, for the court refused to consider the evidence in this case, and instead based its opinion on the conclusions Ball drew from that evidence. There is, of course, no proof anywhere in the record that the jury made these same conclusions. Indeed, no one can know what the jury found. Given the inflammatory and prejudicial presentation by Ball's counsel, however, it is impossible to believe that the jury was not hopelessly confused as to its true responsibility—or that its verdict reflects anything save that confusion. The Kentucky Supreme Court's deliberate distortion of the record in this case—and of the law it is charged with administering—reflects a baffling reverence for misguided jury verdicts at the expense of fundamental constitutional principles.

2. The Kentucky Supreme Court Found Actual Malice From A Concocted Theory of Common Law Malice And Insubstantial, Inadvertent Error.

Ever since the birth of constitutionalized American libel law in 1964, this Court has drawn a clear distinction between "actual malice" and common law malice. The latter is equated with ill will, hostility and vindictiveness, and this Court has expressly held that proof of common law malice is *not* sufficient to meet a plaintiff's burden of proving "actual malice." *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967).[16] This is particularly true where, as here,

[16] The rationale for not permitting evidence of spite and ill will to prove actual malice was best articulated in *Garrison*, 379 U.S. at 73,

the purported common law malice bears no relationship to the allegedly false statements at issue.

"Actual malice" focuses solely on the state of mind of the author and publisher of the allegedly libelous statements at the time of publication. To prove actual malice, a plaintiff must present "sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication.*" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added). Actual malice "is not measured by whether a reasonably prudent man would have investigated before publishing." *Id.* at 731. There is no evidence in the record below that Petitioners maintained a subjective awareness that *any* facts supporting their analysis of Ball's performance were incorrect. Indeed, Petitioners still believe the news reports to be substantially true. Salvato's painstaking research into courthouse records, as well as his indisputably accurate quoting of multiple sources of information, including Ball himself, undercuts any notion that Salvato purposely intended to injure Ball through calculated falsehood.

Confronted with the obvious effort expended by Salvato, Ball's counsel attempted to prove "actual malice" by equating that standard with evidence that factual errors existed in the series and that Salvato harbored a long-standing grudge toward Ball. Thus, counsel attempted to prove "actual malice" by trying to prove falsity and then presuming bad motives, "[b]ut such a *res ipsa loquitur* argument has little relevance to the actual malice calculus . . . ." *McDowell v. Paiewonsky*, 769 F.2d 942, 951 (3d Cir. 1985). Yet, because neither falsity nor ill will—nor, indeed, an inappropriate mixture of the two—constitute proof of the requisite culpable state of mind, Ball's counsel elected to weave his web of "evidence" into a preposterous scenario of a vengeful reporter who would use his pen to

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where this Court wrote: "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

destroy Ball's reputation. For the jury, Ball raised the curtain on this drama at Bellevue High School, two years before the articles were published, and ended the play with Salvato fabricating a statistical comparison between two counties that he knew was invalid and would ruin Ball's reputation as a prosecutor. The Kentucky Supreme Court then added its own final soliloquy.

a. The "Vindictive Reporter"

Ball's counsel's portrait of a vindictive reporter centered on the insignificant misunderstanding at Bellevue High School, where, as counsel reminded the jury in his closing argument, "the police . . . said [Salvato] was trying to get some girls to go down behind the stadium and do dope with them." Tr. 1660.[17] Under Ball's counsel's scenario, Salvato held a smoldering hatred against the Bellevue Police for this incident and, *two years later*, transferred his anger from the Bellevue Police Department to Ball when the grand jury probe into corruption in the department failed to result in indictments. Tr. 1033. Ball's counsel's effort to prove "actual malice" through the Bellevue episode might have been laughable had not its other purpose been to smear Salvato as a drug pusher with the jury.

b. The "Fabricated Statistics"

Ball's counsel similarly fostered juror confusion by overwhelming them with evidence regarding Salvato's comparative analysis of Kenton and Campbell Counties. Indeed, Ball's counsel spent the better part of his case-in-chief trying to prove "actual malice" by invalidating this comparison. His reasoning seemed to be that since the comparison was unfair, somebody must have been "out to get Ball." But even if the comparison between the two counties were invalid, Ball still would have had to prove that

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[17] The *police* said no such thing. It was only a high school girl who raised a question with her principal because she did not realize that Salvato was a reporter. The police at the game questioned Salvato briefly and cleared the matter up. Of course, Ball's counsel had to attribute the accusation to the Bellevue Police to fabricate the first link in his make-believe chain of evidence.

Petitioners entertained serious doubts about its validity at the time of publication. The indisputable evidence, however, is that Petitioners fully believed in the validity of the comparison.

During the trial, Ball's chief quarrel with the fairness of the Kenton/Campbell comparison was his insistence that Kenton County Commonwealth's Attorney Donald Buring and he had different methods for disposing of felony cases. Buring testified that he weeded out felony cases that were true misdemeanors in the District Court. Ball claimed that he took every originally-charged felony case through the grand jury to the Circuit Court. This, Ball claimed, invalidated the comparison between the two counties and explained why Ball's plea bargaining and PFO dismissal rates were statistically so much greater in the Circuit Court comparison done by Salvato.

The news report of November 17, however, identified this difference between the two counties. App. at 31a-38a. Salvato specifically reported that Buring reduced some felony charges to misdemeanors at the District Court level, whereas Ball did not begin this process until cases reached the Circuit Court. Salvato discussed this difference in order to explain the extreme discrepancy between plea bargaining and PFO dismissal percentages in the two counties. Salvato's explanation, favorable to Ball, should have dispelled any fiction that Salvato was intentionally making an invalid comparison. Tr. 1056-61.

c. The Kentucky Supreme Court's "Presumption of Malice."

The Kentucky Supreme Court not only looked at just one side of the record, but included as so-called "circumstantial evidence" of malice items related solely to various editorial judgments made by the *Post*—a constitutionally suspect premise for liability entirely unrelated to Salvato's supposed ill will. In its opinion, the court cited as "circumstantial evidence" of malice: "the prominence of the defamatory material," the "oversized subheadings, photographs and graphs, all of dramatic quality," the "heavy

handed way" in which *non-defamatory* material was written, and even the *Post*'s decision to publish two editorials relating to Ball's performance, which the court admitted were "almost exclusively . . . expressions of opinion." App. at 2a - 4a.

None of this "evidence" has any relevance to the actual malice calculus. Indeed, the prominence with which the *Post* displayed the series seems instead to underscore Petitioners' confidence in the importance and soundness of the material being published. *See Diesen v. Hessburg*, 455 N.W.2d 446, 453 (Minn.) (reversing a jury verdict in favor of plaintiff, a county prosecutor, and noting that: "While [plaintiff] contends the Newspaper acted maliciously by 'us[ing] material out of context[,] arrang[ing] facts within the article[s] • • • highlight[ing] the negative opinions and downplay[ing] the favorable opinions,' arguably such organization and editing falls within the newspaper's discretion, as long as the final product was not published with reckless disregard for truth or falsity."), *petition for cert. filed*, No. 90-1079 (Nov. 27, 1990). Under the analysis advanced by the Kentucky court below, important news stories about controversial subjects would seem to be at much greater risk for defamation liability than would less important—and consequently less prominently displayed—news stories.

Similarly inappropriate was the court's elevation of Ball's theory of Salvato's personal "malice" against him to the astonishingly incorrect and constitutionally inappropriate conclusion that actual malice was proved from "evidence from witnesses, too extensive to detail in the space of this Opinion, from which one could infer that Salvato held a grudge against Lou Ball." App. at 6a. Yet, as this Court has repeatedly and expressly held: "The phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will." *Connaughton*, 109 S. Ct. at 2685 n.7. "It is also worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Id.* at 2685 (citations omitted). Thus, even "[a]n

adversarial stance is . . . not indicative of actual malice • • • where, as here, the reporter conducted a detailed investigation and wrote a story that is substantially true." *Tavoulareas*, 817 F.2d at 795-96.[18]

At bottom, the Kentucky court's misinterpretation of the actual malice standard is rooted in its refusal to apply the substantive law of libel, for the opinion, like the law it establishes, improperly and illogically scrambles together unrelated "evidence" regarding malice and falsity. No evidence was produced at trial—and no evidence is cited in the opinion—which would establish, clearly and convincingly, that any particular statement at issue here was published with knowledge of *its* falsity or with reckless disregard for *its* truth. Nor does the record show whether the *jury* made such a determination, or if instead, it, like the Kentucky Supreme Court, took a menu approach to its duties: picking an error from column A, a concocted theory of common law malice from column B, and combining them to make an actual malice meal. *See Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 (1970) (reversing a libel verdict in favor of a plaintiff where "the jury was permitted to find liability merely on the basis of a combination of falsehood and general hostility[,]" which this Court found to be "error of constitutional magnitude").

CONCLUSION

"Speech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment. . . . It is vital to our form of government that press and citizens alike be free to

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[18] As this Court has noted: "[t]he question whether the evidence in the record . . . is sufficient to support a finding of actual malice is a question of law [based] on the unique character of the interest protected by the actual malice standard." *Connaughton*, 109 S. Ct. at 2694-95 (citation and footnote omitted). *See Cruzan v. Director Missouri Dep't of Health*, 110 S. Ct. 2841, 2854 (1990) ("Not only does the [clear and convincing] standard of proof reflect the importance of a particular adjudication, it also serves as 'a societal judgment about how the risk of error should be distributed between the litigants.' ").

discuss and, if they see fit, impugn the motives of public officials." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304-05 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986). The decision below encourages bland reporting and one-sided debate, and thus leaves the future vitality of speech about Kentucky's government and its officers in jeopardy. No matter how distasteful or unfair the Kentucky Supreme Court may have found the series, that alone is an insufficient basis for punishing its publication.

Petitioners respectfully request that their petition be granted, that the decision below be summarily reversed, and that judgment be entered for Petitioner.

Respectfully submitted,

BRUCE W. SANFORD

Counsel of Record

LEONARD H. FREIMAN
ANNE R. NOBLE
MATTHEW G. WEBER
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1500

RICHARD G. MEYER
DETERS, BENZINGER & LAVELLE
2701 Turkeyfoot Road
Covington, Kentucky 41017
(606) 341-1881

Counsel for Petitioners

APPENDIX

SUPREME COURT OF KENTUCKY
87-SC-826-DG

LOUIS A. BALL

MOVANT

V.

E. W. SCRIPPS COMPANY, THE KENTUCKY POST
and
AL SALVATO

RESPONDENTS

ON REVIEW FROM COURT OF APPEALS
86-CA-2-MR
CAMPBELL CIRCUIT COURT NO. 84-CI-1097
OPINION OF THE COURT BY JUSTICE LEIBSON

REVERSING

This is a libel action brought by a public official, Louis A. Ball, Commonwealth Attorney for Campbell County, against The Kentucky Post, a daily newspaper serving the Northern Kentucky area, and Al Salvato, the reporter for the Post who wrote the articles at issue. The case for libel was made primarily on the basis of a two-part series, "Portrait of a Prosecutor," appearing in The Kentucky Post on November 17 and 19, 1984.

The case was tried in November, 1985. Under the instructions submitted a jury found statements in these articles were false and defamatory, and motivated by actual malice as properly defined in the jury instructions, and awarded Ball compensatory damages in the sum of $175,000. The jury was instructed on punitive damages, but made no punitive award. The newspaper appealed to

the Kentucky Court of Appeals where the case was reversed and dismissed in August, 1987, by a divided court (2-1), the majority holding "there is no clear and convincing evidence that these articles were published with the requisite knowledge of falsity or reckless disregard for the truth necessary to remove them from constitutional protection." We accepted Discretionary Review and first heard oral arguments in June, 1988. We then decided to abate a final decision because the decision of the U.S. Sixth Circuit Court of Appeals in *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825 (6th Cir. 1988), a case similar in many respects to the present case, had been accepted for review by the United States Supreme Court. Its decision is reported in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). After the *Connaughton* case was decided by the U.S. Supreme Court, we heard reargruments in the present case in June, 1990, and reconsidered the case. Based on the law of libel in Kentucky, as constrained by the decisions of the United States Supreme Court regarding the First Amendment protection of freedom of the press, including the mandate that appellate judges in such cases "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity [*Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 514, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)]," we reverse the Court of Appeals and reinstate the judgment of the trial court.

The prominence of the defamatory material displayed in the articles in question can only be appreciated by viewing the newspapers as printed. "Portrait of a Prosecutor" is the lead story on the front page in both the November 17th and 19th newspapers, accompanied by oversized subheadings, photographs and graphs, all of dramatic quality.

The major sub-headline in the November 17 article is styled "Lou Ball's Record Lags Behind Others." There are graphs with statistical comparisons between Ball's Camp-

bell County performance and neighboring Kenton County, very unfavorable to Ball. One graph is labeled in bold print, "Persistent Felony Offender Rates," and the second is labeled in equally bold print, "How Felony Cases Are Handled."

The large, bold-faced subheading on the November 19 article is styled "Serious Gap With The Police." Again Ball's picture is prominently displayed, this time accompanied by an equally prominent picture of "former narcotic officer David Patchell," with a statement from Patchell:

> "He turns them right back, and they commit crime after crime. They couldn't have a better friend."

There is also a comment from Ball next to his picture,[1] but the comment has little impact in offsetting the overall defamatory character of the article. There is a second article on page two in the November 19 edition, headlined "Ball's Record on Plaza Bingo and Cinema X," which is derogatory, but hardly defamatory. Its significance in this case relates only to the malice which can be inferred from the heavy handed way in which it was written.

There were also two editorials in the newspaper, one dated July 2, 1984, headlined "The Real Crime in Bellevue," and a second dated November 26, 1984, headlined "Our Challenge to Lou Ball," which are derogatory to Ball but not in themselves false and defamatory. The first accuses Ball of mishandling a Campbell County grand jury investigation into the Bellevue Police Department, and the second, generally critical of the way Ball performed his office, calls on "Mr. Ball to improve his record," and suggests:

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[1] "If there is a problem, it's that the police do not follow up their investigations."

> "An unhappy public could ask him to resign, but the public might be better served if it looked to Mr. Ball's promise."

The material within these two editorials relates almost exclusively to expressions of opinion, although there are isolated references which are arguably false statements of underlying facts. The primary, if not the exclusive, purpose of the editorials is as evidence of bias or hostility against Ball, which, standing alone, would not suffice to prove actual malice against Ball, but which lends credence to other circumstances which the appellant asserts as proof of actual malice. Some of these other circumstances are:

1) Evidence that the newspaper reporter, Salvato, bore a grudge against some members of the Bellevue Police Department because of an incident occurring at a high school football game in Bellevue, Kentucky, during 1982, a grudge which he extended to Ball when he did not pursue charges against the Bellevue Police Department vigorously enough to suit Salvato. In 1982, Salvato was researching the topic of drug use among young persons in Northern Kentucky. According to the testimony of Officer Joe Chandler of the Bellevue police department, he was called to investigate a report that "Al Salvato was trying to get some girls to take some dope with him because he was depressed." Salvato was not arrested for this incident after he advised the police officer that "he was working for The Kentucky Post and that he had permission from Judge Kopowsky to be there to do this." Nevertheless, at the request of the school, Salvato was made to leave the game.

Salvato and the Post then published a number of stories concerning alleged police irregularities in Bellevue. The Kentucky State Police conducted an investigation of the Bellevue police department the early part of 1984. The State Police compiled and submitted a report to the Campbell County Grand Jury regarding the Bellevue police, but

the Grand Jury returned no indictments. It was shortly thereafter that the July 2, 1984 Post editorial appeared criticizing Ball, whom the newspaper referred to as timid. Following the Grand Jury's report, the Post decided to take an in-depth look at Ball and his office. Based on these facts, Ball claims the jury had reason to believe Salvato was motivated to "get" Lou Ball.

2) In the investigation into the conduct of Lou Ball's office that followed, beginning in July 1984, Salvato reviewed Campbell Circuit Court Clerk's records to compile records regarding case disposition. Ball cites as evidence that Salvato acted with malice in his heart that when he would come to a case where a felony charge was reduced to a misdemeanor or a persistent felony offender charge was dismissed, Salvato would mark "good case" in his notes.

3) Salvato selectively interviewed only a few persons hostile to Ball as background material for his news articles, deliberately choosing not to interview those who could contradict their claims. For instance, he interviewed a convicted felon who claimed he was forced to plead guilty in exchange for dropping a persistent felony offender charge against him, but not the felon's lawyer. For further example, in investigating the background for Kenton County statistics, instead of talking to the person who was the Commonwealth's Attorney for the years in question (1979-84), he interviewed an Assistant currently seeking election to the position. The movant produced evidence Salvato knew the Kenton County system for negotiating in felony cases was different from the Campbell County system in that persistent felony offender charges were reduced before the case went to the Grand Jury in Kenton County and not in Campbell County, Salvato told his editor that cases were handled differently in Campbell County from Kenton County, but Salvato ignored this difference in the newspaper article of November 17, 1984, when he reported

the comparison in statistics between Kenton and Campbell Counties.

4) The defamatory statement from former narcotics officer, David Patchell, that "Ball turns [criminals] right back, and they commit crime after crime; they couldn't have a better friend," was printed although Salvato was told by a judge who had considerable experience with Patchell that he was "a very poor police officer, totally unreliable." Also, before Patchell's statement was printed, Ball's Assistant Commonwealth Attorney had gone to The Post and Salvato and tried to show them some applicable case files to establish Patchell's unreliability, files which they had refused to review.

There is other evidence from witnesses, too extensive to detail in the space of this Opinion, from which one could infer that Salvato held a grudge against Lou Ball. One last item of particular note testified to by Ball was a statement that Salvato made to him during a telephone conversation, presumably implying a threat, that Ball would be "hearing from" them.

Turning from the underlying evidence which Ball cites as proof substantiating actual malice to the statements in the news articles which Ball specifically states to be false and defamatory, the major ones are these:

1) Patchell's statement, previously quoted, that Ball turns criminal "right back" into society to "commit crime after crime; they couldn't have a better friend."

2) "Ball has lost about half of the cases he has taken to trial in the last six years." Salvato admitted miscalculating his statistics on conviction rates when transposing the numbers into percentages, so that the percentages stated in the newspaper were false. The correct statistics would show Ball won 73% of the cases for the period involved.

3) A statement that Ball's office continually asks for unnecessary continuances, causing needless delay. A background check would have revealed the continuances were related to illness of the judge and other problems beyond the prosecutor's control.

4) Ball's office had a much greater propensity to dismiss persistent felony charges in exchange for a guilty plea as compared to Kenton County. The reporter knew the plea bargaining method was different so the statistics could not be compared.

5) Ball had brought a convicted felon to his office and coerced him by threat of a persistent felony charge to plead out. A check with this person's attorney would have proved this false.

6) Ball failed to give the Campbell County Attorney assistance in investigating misdemeanor charges involving pornography at the Cinema X when asked to do so. There was a letter from the County Attorney to Ball thanking him for his help.

The newspaper challenged the fact and degree of falsity of these statements (and others at issue), but there was substantial evidence from which the jury could decide that these statements were false, and they were certainly defamatory in the normal sense of the word. As defined in the *Restatement, Second, Torts*:

> § 559: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."
>
> § 563: "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."

As is usual in cases such as this one, there was a great deal of conflict in the testimony as to what statements in the articles were statements of fact, as opposed to statements of opinion, and as to what the witnesses were actually saying when their various answers were compared one with the other. Isolated answers are often ambiguous, so the question then becomes what is the import of the answer when considered in context. At least in deciding what are the so-called underlying, subsidiary or historical facts, as contrasted with the finding of malice, where the evidence conflicts appellate review still must be in terms of what the jury could find as the true facts and what the jury could reasonably infer from the testimony of witnesses when considered as a whole. *Harte-Hanks Communications, Inc. v. Connaughton, supra.* We accept the jury's finding as to disputed facts when there is supporting evidence because we claim no superior ability to divine the truth by reason of judicial office, and we question the good judgment of any judge who thinks he has such special powers.

The landmark case extending First Amendment protection to comment by the news media on the conduct of public officials or public figures is, of course, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). *New York Times Co. v. Sullivan*, and its progeny, interpret the First Amendment guarantees of freedom of speech and press as imposing constitutional limitations on state libel laws, holding that misstatements of fact published by the news media about the conduct of public officials enjoy constitutional privilege unless "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 376 U.S. 279-80. As stated in *St. Amant v. Thompson*, 390 U.S. 727, 730, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the concept of "reckless disregard" "cannot be fully encompassed in one infallible definition." In *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.

2d 125 (1964), reckless disregard is described as a "high degree of awareness of . . . probable falsity," and in *St. Amant v. Thompson, supra*, 390 U.S. at 731, as circumstances proving the publisher must have "entertained serious doubts as to the truth of his publication." Rarely will the publisher confess to actual knowledge of falsity, or a high degree of awareness of probable falsity, or serious doubts as to the truth of the publication, and, nevertheless, as in the *Connaughton* case, *supra*, there are a number of cases subsequent to the *New York Times* case wherein the standard of reckless disregard has been proved by circumstantial evidence.

New York Times and its progeny further require that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect" (*Id.*,376 U.S. at 285), and that in "applying these standards . . . the proof presented to show actual malice" must do so with "the convincing clarity which the constitutional standard demands" (*Id.*, 376 U.S. at 285-86). We follow these precepts and find the evidence more than sufficient to rise to the standard imposed.

The most recent decision of the United States Supreme Court, the *Connaughton* case, plainly states that "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Supra*, 109 S.Ct. at 2686. It is not absolutely clear in the *Connaughton* case that the majority on the United States Supreme Court fully embraced the view taken in the Sixth Circuit Court of Appeals that a reviewing court should defer to all "subsidiary facts that the jury 'could have' found." 109 S.Ct. at 2680. Nevertheless the United States Supreme Court did identify three subsidiary fact issues which were in dispute wherein it stated "the jury *must* have rejected" the publisher's position, and the United States Supreme Court then concluded:

> "When those findings are considered alongside the undisputed evidence, the conclusion that the newspaper acted with actual malice inextricably follows." 109 S.Ct. at 2681.

Justice Scalia, in his Concurring Opinion, states:

> "This analysis adopts the most significant element of the Sixth Circuit's approach, since it accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony." 109 S.Ct. at 2701.

Justice Scalia's Concurring Opinion fully embraces the decision of the Sixth Circuit Court of Appeals that a reviewing court should accept the jury's determination as to all underlying, subsidiary or historical facts where on the evidence "the jury could reasonably have reached that conclusion," thus applying the customary "clearly erroneous" standard of appellate review before undertaking the independent review to determine malice which the First Amendment requires. These facts are reviewed on the basis of the reasonable inferences from the evidence presented by the prevailing party. It is interesting to note that three other members of the court, White, Kennedy, and the Chief Justice, "read ... the court's opinion" as "consistent with the views expressed by Justice Scalia in his concurrence." If the United States Supreme Court opinion is not co-extensive with the Sixth Circuit opinion in *Connaughton v. Harte-Hanks Communications, Inc., supra*, it seems nearly so. Here, considering the plaintiff's evidence regarding factual circumstances to prove malice and plaintiff's proof that statements in the article were false and defamatory, on independent review we find, with "convincing clarity" (*New York Times, supra,*), a "high degree of awareness of probable falsity" (*Garrison v. Louisiana, supra.*).

Recently, in *Fitch v. Burns*, Ky., 782 S.W.2d 618, 622 (1990), we had occasion to consider the meaning "of 'satisfying the burden of persuasion' where there is a 'requirement of clear and convincing proof.'" We state:

> "*McCormick[on Evidence*, 2nd ed., p. 796, Sec. 340(b) (1972)] states . . . 'no high degree of precision can be obtained by these groups of adjectives,' . . . the best formulation . . . to express this concept is that the trier of fact 'must be persuaded that the truth of the contention is 'highly probable.' '"

Here we have no hesitancy in stating that taking as true the plaintiff's proof as to the facts and circumstances surrounding publication of the November 17 and 19 articles in the Post on the "Portrait of a Prosecutor," the plaintiff has proved actual malice as defined in *New York Times v. Sullivan* and its progeny by clear and convincing evidence. We include in the circumstances surrounding publication the way in which the articles were laid out, the evidence regarding malice which we have discussed, and the failure to make any retraction.

The respondents have taken issue with the characterization as fact rather than opinion with regard to a number of the statements movant complains of as defamatory. Space does not permit discussing each statement separately. It suffices to say that in each instance we have considered the matter and determined that, taken in context and giving consideration to the various supporting facts and statistics elsewhere supplied in the article, we believe these statements can fairly be characterized as statements of fact rather than opinion. The statement most subject to debate is that from former narcotic officer, David Patchell, quoted in oversized print next to his picture at the top of p. 1 of the November 19, 1984 edition, that "Ball turns [criminals] right back, and they commit crime after crime; they couldn't have a better friend."

Recently we have had occasion to consider the issue of fact versus opinion in *Yancey v. Hamilton*, Ky., 786 S.W.2d 854, 856 (1990). In *Yancey*, the Kentucky Post "ran a feature story about Yancey's background as a 'sidebar' to the news article about his arrest [for double murder]." The article quoted a person who had "known the family for years" as stating, among other things:

> "He was a smooth talker. He was a con artist. I would never lend him money."

These remarks fall short of being as pointedly factual as those made by police officer David Patchell, credited with intimate knowledge of the way Louis Ball prosecuted his cases. In *Yancey*, we adopted the "approach to the fact-opinion distinction" found in *Restatement (Second) Torts*, § 566 (1977):

> "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as a basis for the opinion." *Id.* at 857.

Patchell's statements certainly qualify as statements of fact under this standard, statements implying actual knowledge of undisclosed facts upon which he bases his opinion. The following quotation from *Yancey v. Hamilton*, *supra*, is equally applicable to the present case:

> "We have previously held that alleged defamatory statements 'should be construed as a whole.' *McCall v. Courier-Journal & Louisville Times*, Ky., 623 S.W.2d 882 (1981), *cert. denied*, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 849 (1982); *see also Restatement* § 615 Comment d (factors considered by court and jury). Considering then, the statement here in contention, we find that in the whole context of its publication, Hamilton's comments created a reasonable inference that

> they were justified by undisclosed defamatory facts." *Id.* at 857.

The respondents complain that the instructions in the present case were deficient because they did not submit by separate interrogatory every alleged defamatory statement of fact and every alleged fact from which malice might be inferred, so that a reviewing court could utilize this information in conducting an independent review of the issue of actual malice. We have reviewed the court's instructions, and find them to be adequate. They conform to the Kentucky approach to jury instructions in civil cases, which is:

> "They should not contain an abundance of detail, but should provide only the bare bones of the question for jury determination. This skeleton may then be fleshed out by counsel on closing argument." *Rogers v. Kasdan*, Ky., 612 S.W.2d 133, 136 (1981).

The respondents did not specifically object to the instructions as given, as required by CR 51(3). Instead they tendered 41 "jury charges," 47 pages in length, followed by interrogatories which would have put the burden on the jury to "list those statements which you find to be false and not substantially true," then list "those false statements . . . that you find to be of and concerning the plaintiff," then "repeat those false statements which are of and concerning the plaintiff . . . which you also find to be defamatory of plaintiff," then "repeat each statement listed . . . that you are clearly convinced was published by defendants with knowledge that the statement was false or with a high degree of awareness that it was probably false," etc., etc., etc. In short, the proposed interrogatories were both unsuitable and unreasonable, so completely so that they could not form the basis of a complaint regarding failure to give interrogatories, even were we otherwise to inclined to consider the matter.

We have reviewed the respondents' complaint regarding proof to support a damage award in the sum of $175,000. As stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974):

> "[A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

Given the enormous damage to the movant's reputation which could be reasonably inferred from the nature of the evidence produced, together with other evidence about the effect on him physically and emotionally, the award of $175,000 in compensatory damages was justified by the proof.

In conformity with the mandate of the United States Supreme Court, we have conducted an independent review of the record to insure that this verdict does not interfere with constitutionally protected free expression. For the reasons we have stated, we are convinced that it does not. We reverse the decision of the Court of Appeals and reinstate the judgment of the trial court.

Stephens, C.J., Combs, Gant, Lambert, Vance, JJ., and Special Justice Stephen Wilborn, concur.

ATTORNEYS FOR MOVANT:

Frank V. Benton, III
BENTON, BENTON & LUEDEKE
18 N. Fort Thomas Avenue
Fort Thomas, KY 41075

ATTORNEY FOR RESPONDENT:

Richard G. Meyer
DETERS, BENZINGER & LAVELLE
2701 Turkeyfoot Road
Covington, KY 41017

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 86-CA-2-MR

E. W. SCRIPPS CO., THE KENTUCKY POST, AL SALVATO
APPELLANTS

v.

LOUIS A. BALL
APPELLEE

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE KELLEY ASBURY, SPECIAL JUDGE
ACTION NO. 84-CI-1097

REVERSING

• • •

BEFORE: HAYES, REYNOLDS and WILHOIT, Judges.

REYNOLDS, JUDGE. This appeal arises from a judgment of the Campbell Circuit Court wherein a jury awarded appellee, Louis A. Ball (Ball), the Commonwealth Attorney for Campbell County, $175,000 in damages for alleged defamatory statements published in a local newspaper. Appellants are *The Kentucky Post* (Post), a daily newspaper serving the Northern Kentucky area, Al Salvato (Salvato), a special projects reporter for the Post at the time the statements were published, and the E. W. Scripps Company, the parent company of the Post. For the reasons set forth below, we reverse.

This situation presents complex issues, involving newspapers and public officials, which have yet to be litigated in Kentucky. A careful review of all relevant facts is essential to initially set the "stage" wherein appellee pre-

sented testimony concerning an event involving Salvato which took place at a high school football game in Bellevue, Kentucky, during 1982. At this time, Salvato was researching the topic of drug use among young persons in Northern Kentucky. (This research subsequently resulted in a series of award-winning articles Salvato wrote for the Post). While attending the football game, Salvato became involved in a dispute with Bellevue High School officials. Each side gives a differing account of the reasons behind this disagreement and the results of the dispute. It is clear, however, that Salvato was asked to leave the stadium by an officer of the Bellevue Police Department.

Appellee contends that the event aforesaid initiated a long running dispute between Salvato and the Bellevue Police, which eventually involved his office. Appellants deny any connection between this event and any subsequent publications, and argue that the admission of testimony involving this incident only served to inflame the jury. Nevertheless, sometime later, the Post published a number of stories concerning alleged police irregularities in Bellevue. Salvato wrote or co-wrote several of these. Largely as a result of these stories, the Kentucky State Police conducted an investigation of the Bellevue Police Department during the early part of 1984. At the conclusion of the investigation, the state police compiled and submitted a report to the Campbell County Grand Jury for any appropriate action. The Post also received a copy of the State Police report. The Grand Jury returned no indictments, but made several recommendations to Bellevue officials.

On July 2, 1984, the Post published an editorial critical of the Grand Jury's actions concerning this matter. Particular criticism was leveled at Ball, to whom the newspaper referred as timid.

Following the Grand Jury's report, the Post decided to take an in-depth look at Ball and his office. This was spurred, appellants contend, by reports critical of Ball from

Grand Jury members as well as from police and city officials throughout the county. Salvato was assigned to the story. His first act was to begin a review of five years of felony case files in Campbell County. He also interviewed several of Ball's critics, and conducted lengthy interviews with Ball and several members of his staff.

Salvato's investigation reportedly took three months. After completing his research in Campbell County, he reviewed case files in Kenton County and several other localities to form a basis of comparison. This research culminated in a two-part series, published in the Post under Salvato's byline on November 17 and 19, 1984, entitled "Portrait of a Prosecutor." A large portion of this series compared Ball's office with the office of the Commonwealth Attorney in neighboring Kenton County.

The stories were critical of Ball's professional performance. They alleged that, in comparison with Kenton County officials, Ball's office was softer on persistent felons (PFOs), relied more upon plea bargaining, was less successful in its prosecutions, and that Ball had a strained relationship with law enforcement officials. The series included a number of charts supporting these allegations. Although Ball and members of his staff were quoted extensively throughout the series, it was argued that the stories were misleading because certain procedural differences in the two counties were not explained. Appellee also argued that other statistics favorable to his office were ignored, while appellants contend that the comparison was valid.

On November 26, 1984, based on material from the series, the Post published another editorial critical of Ball's performance and asking for change. Ball was unhappy with the Post's reporting, and sent a letter asking for a retraction. This request was denied by the Post, and Ball's letter was never published. The Post, however, published several letters critical of the series and at least one letter

critical of Ball. On December 27, 1984, they also published a commentary by J. Robert Lilly, associate professor of sociology at Northern Kentucky University, who took issue with Salvato's research methods and use of statistics.

Ball subsequently brought this current action, alleging defamation in the July 2 editorial, the two-part series, and the editorial of November 26. During pretrial discovery, after several motions by appellants, Ball set out 32 specific allegedly defamatory comments. Appellants argued that none of the comments were actionable, but this argument was initially rejected by the trial court. At the conclusion of appellee's (plaintiff below) testimony, however, the court dismissed five comments from the suit because they were protected as opinion. This included all of the allegedly defamatory comments from the July 2 editorial, as well as two of the comments from the November 26 editorial.

After all testimony, appellants submitted a lengthy jury instruction containing a number of interrogatories. This instruction was rejected by the trial court, which tendered a brief instruction, with no interrogatories, on the law of defamation. The jury returned a verdict awarding Ball $175,000 in compensatory damages. Punitive damages were not awarded. Appellants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. These motions were denied by the trial court, and this appeal followed.

Appellants contend that there was insufficient proof on the issue of actual malice, as required by *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny. They argue that, even if actual malice was present, damages were not sufficiently proven.

In examining allegations of defamation, especially in instances involving a public figure, an appellate court is charged with making "an independent examination of the whole record . . . (cite omitted) . . . so as to assure that

the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan*, 376 U.S. at 285; *see also Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984). There is no dispute that Ball, as Commonwealth Attorney, meets the requirements of a public figure set out in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). He therefore has the burden of proving by clear and convincing evidence, "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. at 279-80; *see also Sparks v. Boone*, Ky. App., 560 S.W.2d 236, 238 (1977). To show reckless disregard, a plaintiff must show more than "whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); *accord E.W. Scripps Company v. Cholmondelay*, Ky. App., 569 S.W.2d 700, 704 (1978).

We recognize that this places a great burden on individuals in appellee's position. As this Court has previously noted:

> There must be limits placed on the right of individuals to attack public figures and candidates for public office . . . For the criticism to be actionable, however, malice must be shown. The requirements for the proof of such malice have been set forth in *New York Times, supra*, and the subsequent Supreme Court decisions.

Sparks v. Boone, Ky. App., 560 S.W.2d at 239. The trial court determined that there was sufficient evidence to submit the question of appellants' malice to the jury. The first

stage of our review is to decide whether this determination was correct. *See Bose Corporation v. Consumers Union*, 466 U.S. at 514.

Appellee presented competent evidence that the publications contained false statements of fact. Appellants admitted that figures were transposed while computing Campbell County's conviction record. Although appellants contend that this was accidental, it had the effect of totally misrepresenting the success rate of Ball's office in criminal prosecutions. Several other factual errors were alleged and appellee contends that, at the least, appellants' use of statistics concerning PFO's was extremely misleading.

Much trial testimony centered on the different systems for handling PFO's in Campbell and Kenton Counties. Appellee argued that the large discrepancy in PFO convictions should have alerted appellants to the possibility that the two counties operated differently. He also produced evidence that statistics from the Boone County Commonwealth Attorney's office, which were similar to the PFO statistics in Campbell County, were purposely ignored. According to appellee, this creates a strong inference that the articles were written and published in a manner calculated to place him in a false light. Testimony from several witnesses, including one who testified for appellants, bolsters this argument. Their impression, after being interviewed by Salvato, was that appellants were out to "get" Ball.

Salvato's own testimony also provides some support for this theory. At deposition, he admitted to being unconcerned with any underlying facts which might explain the difference between the two Commonwealth Attorneys' offices. "I was more interested in results," he said. Salvato also testified, at trial, that he personally believed that appellee was doing a poor job. While Salvato did testify that he believed that everything published concerning appellee was true, this belief is not sufficient to insure a

favorable verdict. *St. Amant v. Thompson*, 390 U.S. at 732.

However, the fact that appellants published false statements of fact concerning appellee is not sufficient. Erroneous statements are inevitable in free debate, and such statements must be protected if freedom of expression is to survive. *New York Times v. Sullivan*, 376 U.S. at 271-272. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341.

Kentucky has held that "[w]here the defendant is a newspaper, the rule is that it is not to be held to the exact facts or to the most minute details of the transactions that it reports. What the law requires is that the publication be substantially true." *Bell v. Courier Journal and Louisville Times*, Ky., 402 S.W.2d 84, 87 (1966). *See also, Pearce v. Courier Journal*, Ky. App., 683 S.W.2d 633, 635 (1985).[1] The law is also committed "to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. at 270. Such attacks might conceivably damage the reputation of public figures, such as appellee. Errors which cause injury to official reputation, however, provide no more reason for repressing free speech than do other factual errors, even if the stories contain half-truths and misinformation. *Id.* at 272-273.

Alleged defamatory material must be measured by its probable effect on the mind of the average reader. *McCall*

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[1] This does not mean, however, that a publication will be free from liability as long as it reports newsworthy statements, regardless of the source or the publication's belief concerning the statement's truth. This doctrine, known as "neutral reporting," has been specifically rejected in Kentucky. *McCall v. Courier Journal and Louisville Times Company*, Ky., 623 S.W.2d 882, 886-87 (1981), *cert. denied*, 456 U.S. 975 (1982); *Pearce v. Courier Journal*, 683 S.W.2d at 636.

v. Courier Journal and Louisville Times Company, Ky., 623 S.W.2d 882, 884 (1981), cert. denied 456 U.S. 975 (1982). In the situation before this Court, the jury was instructed to find liability if the stories contained false and defamatory statements about appellee, which were made with actual malice. Actual malice was defined as "knowledge of the falsity of a statement or statements that are defamatory or a high degree of awareness that the statement or statements are false."

There is a significant difference between proof of actual malice and mere proof of falsity. *Bose Corporation v. Consumers Union*, 466 U.S. at 511. In this situation, evidence was presented that could convince a jury that these publications were one-sided. Much of appellants' research and use of statistics was shown to be sloppy or incomplete. However, proof of a failure to investigate, without more, does not establish actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 332.

These publications might well have presented erroneous information which created an unfair and an unflattering picture of appellee and the public office which he holds. This Court does not support the type of reporting that results in such false information being disseminated to the public.

> But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First

> Amendment protect some erroneous publications as well as true ones.

St. Amant v. Thompson, 390 U.S. at 731-732.

We determine there is no clear and convincing evidence that these articles were published with the requisite knowledge of falsity or reckless disregard for the truth necessary to remove them from constitutional protection. Appellants' criticism was solely based on appellee's official conduct. "One who holds public office subjects his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands." *Bell v. Courier Journal*, Ky., 402 S.W.2d at 88. Even though appellee presented some testimony concerning an alleged vendetta against him, it fell short of the clear and convincing evidence of actual malice needed to bring this matter before a jury.

Having concluded that there was not a sufficient showing of actual malice, we find it unnecessary to address the issue of damages.

For the foregoing reasons, the judgment of the Campbell Circuit Court is reversed.

HAYES, JUDGE, CONCURS.

WILHOIT, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

WILHOIT, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. While I agree with the majority that the appellee failed to establish by clear and convincing proof "actual malice" with respect to most of the alleged instances of defamation, I must part company with them when it comes to the November 17, 1984, article entitled "Portrait of a Prosecutor" and headlined "Lou Ball's record lags behind others." I believe that, taken in the context of the entire article, the jury could have found the

statement, "Ball has lost about half the cases he has taken to trial in the last six years," to be defamatory. Furthermore, the entirety of the evidence together with that bearing directly on this statement were sufficient to establish clearly and convincingly, depending upon what testimony the jury believed and the reasonable inferences it drew, that Mr. Salvato realized this statement was false.

I would remand this case for a retrial limited to this claim of defamation.

ATTORNEYS FOR APPELLANTS:

Charles H. Deters
Richard G. Meyer
2701 Turkeyfoot Road
Covington, Kentucky 41017

Bruce W. Sanford
Washington Square
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

ATTORNEY FOR APPELLEE:

Frank V. Benton III
18 North Fort Thomas Avenue
Fort Thomas, Kentucky 41075

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

84-CI-1097
Special Judge Kelley Asbury
LOUIS A. BALL

PLAINTIFF

VS

THE KENTUCKY POST,
E. W. SCRIPPS, CO., AND
AL SALVATO

DEFENDANTS

ENTERED
CAMPBELL CIRCUIT COURT
NOV 26 1985
THOMAS J. CALME, CLERK
BY /s/_____D.C.

TRIAL ORDER, VERDICT AND JUDGMENT

This case coming on for trial, came the plaintiff and his attorney, Hon. Frank Benton, III, and the defendants, Judith Clabes, Al Salvato in person and The Kentucky Post and E. W. Scripps Co. by their attorneys, Hon. Charles H. Deters and Hon. Richard Meyers, and each side announced ready for trial.

There upon to try the issue came the following named jury, to-wit: Shellee Wagner, Vicki Thompson, Audrey Clift, Harold Dedman, Robert Taylor, Jennifer Roberts, Sandy Boesch, Hagan Baker, Edward Braun, Anne P. Perry, Ruth Trumbull, William Richardson, Louis Schmidt and Daniel Mangulabnan who were duly selected and sworn according to law. It is ordered that Carol Evans, official court reporter, report the trial of this case according to law.

Opening statements were heard, testimony in chief and rebuttal was presented at the close of which the jury was instructed and closing arguments were preesnted [sic]. The number of the jury was then reduced from fourteen to twelve by placing the names of the fourteen jurors in a box in open Court and the Deputy Clerk shaking the box and without exposing the names, withdrawing two slips which had the names of Ruth Trumbull and William Richardson, who were then excused from the jury, thus reducing the jury to twelve.

The jury then retired to the jury room to consider a verdict and returned the following verdict, to-wit:

"We the jury agree and find for the plaintiff and award him damages under Instruction No. III in the sum of $175.,000.00."

At the close of the evidence, the defendant, Judith Clabes, having made a motion to dismiss this action against her and the motion being well taken Judith Clabes was dismissed as a party to this action.

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff, Louis A. Ball, be and is hereby awarded judgment against The Kentucky Post, E. W. Scripps, Co. and Al Salvato in the sum of $175,000.00.

Witness my hand this the 25th day of November, 1985.

/s/ Kelley Asbury
KELLEY ASBURY, SPECIAL JUDGE
CAMPBELL CIRCUIT COURT

I hereby certify that a true and correct copy of the foregoing Trial Order, Verdict and Judgment was mailed to:

1. Hon. Frank V. Benton, III, 18 North Fort Thomas Avenue, Fort Thomas, Kentucky 41075, Attorney for the Plaintiff;

2. Hon. Charles H. Deters, 2701 Turkeyfoot Road, Covington, Kentucky 41017, Attorney for the Defendants.

This the 26th day of November, 1985.

TOM CALME, CLERK
CAMPBELL CIRCUIT COURT

BY: /s/_____D.C.

THE REAL CRIME IN BELLEVUE

[The Kentucky Post (Editorial)—July 2, 1984]

The Campbell County grand jury closed the book on the Bellevue Police Department last week, but the jury has written one of those endings that leaves a reader hanging.

After months of state police investigation and days of grand jury deliberations, no criminal charges will be filed against members of a department that stands accused of mishandling items in its property room, botching investigations and juggling payroll records.

So what happens next in a town where the police have been severely criticized but found guilty of no crime?

The grand jury left a postscript to this story that might help answer the question.

The jury issued a report on the police department. It is short, low-key and almost timid in tone. But it makes a few startling recommendations. The grand jury suggests that the police department start keeping accurate time and tax records. It suggests that the police come up with a way to guarantee the security of items in their custody. It suggests that policies and procedures be put down on paper and that standards be established for hiring and training officers.

The grand jurors were advised that they couldn't be critical if they couldn't indict, but the very fact that these recommendations have been made is a kind of indictment.

It's an indictment of the police department's administration that recovered property and evidence can't be protected, and no one is certain who worked when and earned what taxable income, that auxiliary policemen are hired who can barely read and write, that officers don't know if it's proper for them to repossess cars, in uniform, for a dealer.

There may not be a law against such poor administration of a police department, but it's a kind of crime that went on so long.

Campbell County's judges, prosecutors and police officers have known for years about the poor quality of police work in Bellevue. They've known of the botched investigations, the missing evidence, the incomplete reports, the improper treatment of juveniles.

They've heard the tales of juggled time sheets and shenanigans in the property room. They've heard tales of worse.

A previous grand jury—one that was less timid—issued a report several years ago criticizing the Bellevue department's handling of criminal investigations.

County and commonwealth prosecutors met with Mayor Will Hundemer then, but nothing happened after that until a rash of burglaries alarmed Bellevue's residents and four unhappy police officers came forward to tell their stories in the newspaper.

And what happened then? The buck was passed to the state police.

The state police confined their investigation to possibly criminal matters and reported to prosecutor Lou Ball. After a few weeks' hesitation, Ball took the report to the grand jury. The grand jury questioned the mayor and city council members, Police Chief Elmer Corbin and one of the four officers.

Three of the four officers whose accusations provoked the investigation were never subpoenaed.

When the grand jury found insufficient reasons for indictments, it was warned by Ball not to be critical of any public official in its report.

That warning speaks loudly of Ball's well-deserved reputation for timidity. A more courageous prosecutor would

have advised the jury to use the full weight of its authority and to, at the very least, give reasons for its recommendations.

The jury's report may have been timid, but its message pointed to basic, longstanding administrative problems in the Bellevue Police Department.

In the absence of vigorous leadership from the prosecutor or any other member of Campbell County's legal establishment, it now appears that this small town is being told to solve its own problems—a small town whose leadership failed to act the last time it was told of problems in its police department.

It's a kind of crime that no knowledgeable, authoritative figure is willing to help Bellevue's mayor and city council answer the next question:

Should Chief Corbin, unindicted but tarnished by a long record of administrative failure, continue in his job?

We think not. We think the city fathers should beg, if they have to, until some competent advisers can be found to help them straighten out the police department and to find a new chief to run it right.

But most importantly, we think what has happened to the residents of Bellevue is the real crime, and the people in leadership positions who could have stopped it—especially Mayor Hundemer and prosecutor Ball—should be asking themselves why they failed.

PORTRAIT OF A PROSECUTOR

[The Kentucky Post—November 17, 1984]

Lou Ball's record lags behind others

(First of two parts)

By Al Salvato
Kentucky Post Staff Writer

A review of felony cases since 1979 shows that Campbell County Commonwealth Attorney Lou Ball often reduces charges involving major crimes, routinely dismisses charges designed to put habitual criminals in prison longer and, until two new circuit judges took over this year, took an average of more than eight months to move cases to trial.

The Campbell County Circuit Court record contrasts sharply with that of Kenton County which, like Campbell County, has a core urban area with similar crime problems.

Since 1979 in Kenton County, few felony charges have been reduced, habitual criminals often have received longer sentences and cases have moved from indictment to trial in an average of 2.8 months.

Police in the two counties also point up sharp differences between the two commonwealth attorneys, who are their counties' top prosecutors. Some police say their relationship with Ball should be similar to the relationship police have with their new commonwealth attorney, Don Buring.

Ball's handling of cases has upset some police officers and others involved in law enforcement, who say the prosecutor seldom involves them in plea negotiations and seldom explains why charges are reduced through plea bargaining.

Police in Kenton County say Buring works closely with them and routinely involves them in plea negotiations.

The differences surfaced after The Kentucky Post studied circuit court records in the two counties. The review

started with cases from 1979, so five full years of cases would be included. The study also includes 1984 cases.

In examining the figures, it is important to note that Ball has more experience than Buring. Ball has been commonwealth attorney for nine years. He was re-elected in 1981 to a six-year term. Buring was elected commonwealth attorney this month. He was an assistant to Commonwealth Attorney Frank Trusty for nearly five years before being appointed commonwealth attorney in July. Harry Rankin, who took over after Trusty resigned in 1983, ran the office for a year. Rankin resigned after Buring won the Democratic primary in May and appeared to have no opposition in November.

Buring's office, with an average 264 felony cases a year, has a heavier load than Ball's average of 188 cases. But Buring also has more assistant to handle the work.

The Campbell County record also contrasts with Hamilton County, Ohio (Cincinnati), where prosecutors say they're tough with criminals.

Carl Vollman, the top assistant to Prosecutor Arthur Ney, says Ney's office has followed the policies of former Prosecutor Simon Leis, how a Hamilton County common pleas judge. Leis earned a reputation nationally for several obscenity convictions.

"It was Si's philosophy to be tough," Vollman says.

Ball says comparing the handling of cases in Campbell County to Kenton and Hamilton counties is not completely valid. He emphasizes that the Kenton County Commonwealth Attorney's Office has more help, and that Hamilton County's criminal justice system is structured differently.

"I've never tried to compare this office to another office," Ball says. He says the only way to compare the offices is when "they have exactly the same cases and the same evidence to deal with."

Still, a detailed examination of Campbell Circuit Court records and a comparison with Kenton and Hamilton County records from 1979 to mid-October of this year show significant differences in how felony cases are handled and the outcome of those cases:

Plea bargaining

Since 1979, an average of 44 percent of the defendants indicted for felonies have pleaded guilty to lesser felony charges or to misdemeanors in Campbell County. In Kenton County, the figure is 7.6 percent; in Hamilton County, 27.9 percent.

Many of the Campbell felony cases reduced to misdemeanors involved charges of receiving stolen property. For example, Ball this year has reduced half, or nine, of the receiving stolen property charges to misdemeanors.

Ball says he takes every case to the grand jury. He says the stolen property cases he takes to the grand jury often do not involve property worth more than $100. Because of that, by law, the offenses are misdemeanors, which are handled by a different court and are the responsibility of the county attorney.

Buring says he weeds out the misdemeanor cases before they reach the grand jury.

But records show many other felony cases reduced to misdemeanors in Campbell County have involved more serious crimes. So far this year, the reduced cases have involved six assaults, eight burglaries, eight thefts, eight drug-related offenses and one robbery.

"I can assure that we get some bad cases out of that (grand) jury," Ball says. Ball considers bad cases those that have been poorly investigated by police, those based on weak evidence or those in which witnesses are missing or are uncooperative.

Ball says it is often those cases that result in guilty pleas to reduced charges.

Despite figures showing a significant number of pleas to reduced charges, Ball and his assistants say criminals do not get an easy ride in Campbell County.

Ball says his office takes many things into consideration before a decision is made on a case, especially when it involves reducing charges.

Sometimes, permitting a criminal to plead guilty to a misdemeanor means the criminal actually spends more time behind bars, Ball says.

"I'm in a situation occasionally when I would rather reduce a case to a misdemeanor and have a person serve six months or a year.

"A person can take a felony conviction and be out (of prison) in four months under our system. If they happen to get a year in district court, they serve what they're supposed to serve.

"I give the defendant a choice frequently—a year on a felony or a year on a misdemeanor. The felony can come back to haunt you later or (they get) more time in the county jail."

Because of crowded conditions in state prisons, felony offenders only serve about 20 percent of their sentences. Generally, those convicted of misdemeanors will serve out their sentences.

Therefore, some felony offenders spend less time behind bars than minor offenders even though, by law, sentences for felonies are longer than those for misdemeanors. However, crowded jails in Kenton and Campbell counties also have triggered some early releases.

Once an indictment has been returned, Kenton Commonwealth Attorney Buring says he seldom reduces a

charge unless something "extraordinary happens" in the case. It's a policy former Commonwealth Attorney Trusty followed and one Buring decided to keep.

"If a guy wants to plead guilty to the charge in the indictment, that's fine. But if he doesn't, we tell his lawyers, 'We'll take you to court and beat you.'

"We're going to put the people in jail who belong in jail. The longer they are off the streets, the better for Kenton County," Buring says.

Several police chiefs in Kenton County say Buring won't reduce a felony charge unless police agree. Buring says, and the chiefs agree, that keeping the police involved has helped keep Buring and police on good terms.

"That is the rule rather than the exception," says Covington Police Chief Al Casson. "It's by mutual agreement." More than 80 percent of the felony cases handled by the Commonwealth Attorney's Office come from Covington, records show.

Cases from the Northern Kentucky Narcotic Enforcement Unit, directed by Hal Spaw, are handled by prosecutors in both counties.

Spaw says Ball's office reduces drug-related cases to misdemeanors "without us even being contacted. I don't want my cases reduced unless I know about it." Spaw says Buring asks his advice on cases.

Ball says his office often contacts drug agents about cases.

Some police, in particular detectives in Campbell County, echo Spaw's sentiments on reducing charges, but would not discuss the problem for publication for fear of retribution from Ball.

Ball says he's not vindictive and wants police to work with him.

"The only thing I can say is maybe they're paranoid, I wish they would exhibit their feelings to me."

Guilty pleas

In Campbell County and Hamilton County, about half of the people indicted for felonies since 1979 have pleaded guilty to the charges in their indictments. In Kenton County, the figure is 82.5 percent.

Ball says he was unaware that guilty pleas on pending charges were considerably higher in Kenton County.

Persistent felony offenders

The persistent felony offender law, adopted in 1975, is designed to put career criminals behind bars for a long time. A persistent felony conviction, which increases the length of the sentence on a repeat felony conviction, means the criminal must serve time in prison, with no chance for parole, often for 10 years. There is no equivalent to the law in Ohio.

Since 1979, persistent felony offender charges have been dismissed in an average of 90 percent of the cases in Campbell County. In Kenton County the figure is 28 percent. In nearly every case in Kenton County the defendants also have pleaded guilty to the major charge in the indictment.

Despite the figures, Ball and his assistants say they make sure habitual criminals receive the prison time they deserve.

Assistant Campbell Commonwealth Attorney Houston "Hoot" Ebert says if Ball's office dismisses a persistent felony offender charge, it's usually because the offender is wanted elsewhere in Kentucky or in another state. Ebert says the office knows the offender will spend a long period in jail because of charges elsewhere.

Ebert says Ball's office doesn't dismiss first-degree persistent felony offender charges, the most serious persistent

felony charges. But circuit court records show that Ball has dismissed the 16 first-degree persistent felony indictments in 1983 and 1984.

A Campbell County grand jury last year said it was concerned that convicted felons were serving only 20 percent of their sentences. The jury's report reflected its dismay and recommended the state law concerning persistent felons remain in effect.

Ball says he always recommends that persistent felons receive the maximum sentence for the major charge they face. Maximum sentences are set by law for each felony.

Ball says he has convicted a number of persistent felons, but acknowledges he dismisses the persistent felon charges if he can get a guilty plea on another charge in the indictment.

Ballard Gayhart, 62, says that's what happened to him during plea negotiations with Ball last year. The negotiations resulted in his pleading guilty to two robberies.

Ball "hung the persistent felony offender charge like an ax over my head," said Gayhart, who is serving 20 years at the Kentucky State Reformatory at LaGrange.

He says he sat in jail for three months waiting for his case to come up. Then one day he was taken to Ball's office where he says Ball told him he would dismiss two persistent felony offender charges if Gayhart would accept two 10-year sentences for the robberies in Dayton and Newport.

"When they (prosecutors) hang the PFO over your head, you have no choice but to cop out," Gayhart said. "They're forcing you into something you don't want to do. It's a forced plea."

Ball says he doesn't see anything wrong with using the persistent felon offender law to obtain a guilty plea to another charge.

In Kenton County, the commonwealth attorney consistently gets offenders to plead guilty to the persistent felony offender charge and to the major charge.

Records show that sentences for persistent felony offenders convicted in Kenton County are almost always longer than sentences for defendants in Campbell County who are convicted on similar charges after their persistent felony offender charges are dismissed.

Ball says he's wasn't aware of that.

The wait for trial

Before two new circuit judges, Leonard Kopowski and George Muehlenkamp, took over in January, cases in Campbell County took an average of more than eight months to get to trial. Now the average is less than two months.

Kenton County cases from 1979 through 1983 took an average of 2.8 months to get to trial.

Records show scores of delays in Campbell County cases since 1979 have been at the request of the commonwealth attorney.

Kopowski says that as a district judge for six years in Campbell County, he saw the county jail clogged with circuit court defendants waiting for trial. Kopowski says he vowed to speed up cases when he became a circuit judge. Now cases are taking about 1.8 months to move from indictment to trial.

Kopowski believes cases should be tried within five weeks of arraignment.

Ball says his office has never unnecessarily delayed cases. He says Campbell Circuit Court was short on judges from late 1982 to mid-1983 because former Circuit Judge John Diskin was ill.

He says when Kopowski and Muehlenkamp became judges in January they were surprised there were only

eight pending cases. He says one of the judges had heard there was a tremendous backlog of cases, which Ball says didn't exist.

"My opinion is the system has worked the same before and after Kopowski came," Ball says.

Success in court

Ball has lost about half the cases he has taken to trial in the last six years. Buring and his predecessors have lost about 30 percent of their cases.

Ball says many of the cases his office loses are weak to begin with because of poor police investigations or problems with evidence or witnesses.

Ball also says juries, which recommend sentences for those convicted, are afraid of long sentences, especially when the defendants are young.

Ball seldoms [sic.] tries cases in Campbell Circuit Court himself, leaving that to his assistant prosecutors. He says he tried a murder case about three years ago and another in 1977.

He says trying cases "is not the most pleasant thing . . . because it's a big letdown when you don't get the desired result that was appropriate and that has happened."

Buring says he enjoys trying cases and believes it's one of his responsibilities.

"As an elected official, people expect the commonwealth attorney to try cases. That's what I get paid to do," Buring says.

Persistent Felony offender rates

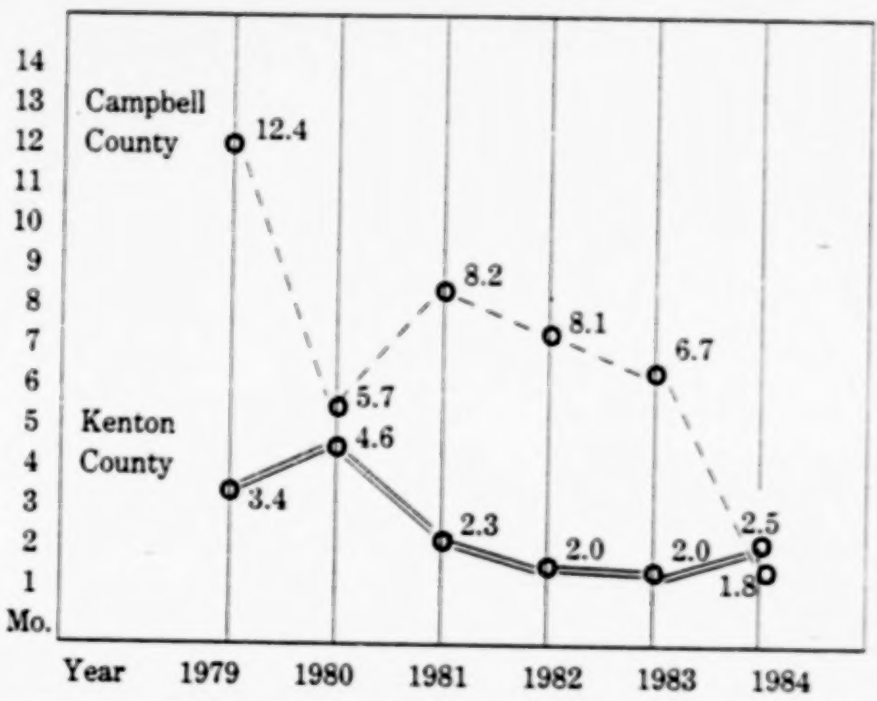
Year	Percentage of convictions		Percentage of dismissals	
1984	18.2	83.3	81.8	16.7
1983	4.3	84.6	95.7	15.4
1982	15.0	70.0	85.0	30.0
1981	7.4	71.1	92.6	28.9
1980	10.0	62.2	90.0	37.8
1979	7.1	60.0	92.9	40.0
Year	Campbell County	Kenton County	Campbell County	Kenton County

How felony cases are handled

Year	Percent pleading guilty to charge in indictment			Percentage pleading guilty to lesser charge*			Percentage of cases that go to trial		
1984	61.2	91.5	47.3	34.0	2.8	31.3	4.8	5.6	21.4
1983	46.9	93.2	51.3	48.8	4.0	31.2	4.4	2.9	17.5
1982	53.3	82.0	51.2	40.6	6.6	29.2	6.1	11.4	19.6
1981	54.2	83.4	48.4	38.4	4.6	31.5	7.5	12.0	20.1
1980	50.0	70.2	52.5	48.3	17.0	27.0	1.6	12.9	20.5
1979	40.2	74.6	58.9	53.8	10.6	17.4	6.0	14.8	23.7
	Campbell	Kenton	Hamilton Ohio	Campbell	Kenton	Hamilton Ohio	Campbell	Kenton	Hamilton Ohio

*(felony and misdemeanor)

Average time between indictment and trial



Between 1979 and 1983, the Campbell County Commonwealth Attorney's office has handled an average of 188 cases a year. The office has three part-time prosecutors.

Between 1979 and 1983, the Kenton County Commonwealth Attorney's office has handled an average of 264 cases a year. The office has two full-time and two part-time prosecutors.

PROSECUTOR FOR 9 YEARS, BALL HAS NEVER BEEN OPPOSED

[The Kentucky Post—November 17, 1984]

By Al Salvato
Kentucky Post Staff Writer

Lou Ball became commonwealth attorney in Campbell County nine years ago.

Ball, 38, has run unopposed twice for the prosecutor's job. The job carries a salary of $48,000 a year, plus expenses.

According to Raymond Larson, the state attorney general's director of special prosecutions, Ball is "highly respected in Kentucky."

Four years ago he was appointed to serve on the state Prosecutor's Advisory Council.

While Ball holds one of the most powerful political posts in Campbell County, he's one of the least visible politicians. He says that's the way he likes it.

"I believe politics should be kept as far away from the prosecutor's office as possible. If anything, a prosecutor should be non-partisan or apolitical because it can be used vindictively. And I think it has in some instances, in some areas."

Ball was born in Campbell County and graduated from Campbell County High School. After graduating from the University of Kentucky Law School in 1970, he joined a law firm headed by Carl Ebert. Ebert's son, Houston, "Hoot," also practiced in the law firm for a time and now is Ball's top assistant.

In 1972, Campbell Commonwealth Attorney Frank Benton III hired Ball as an assistant prosecutor. Benton left his post in 1976 to pursue his private practice. But the

Benton family still is represented in the commonwealth attorney's office. Benton's son, Frank Benton IV, is an assistant commonwealth attorney.

Ball, the elder Benton's assistant for four years, was elected commonwealth attorney in November 1975.

In 1981, Ball ran for a second six year term, again unopposed. His reason for running for re-election was to "continue what I've done for the past six years."

Ball says he felt lucky to run unopposed twice. "I've been surprised. I've had several people come to me and mention the fact they were considering it (running against him). But they didn't do it.

"I have no idea why no one runs against me. Maybe they are satisfied with the job I'm doing."

PORTRAIT OF A PROSECUTOR

[The Kentucky Post—November 19, 1984]

Serious gap with the police

By Al Salvato
Kentucky Post Staff Writer

Police officers in Campbell County, Commonwealth Attorney Lou Ball and a circuit court judge say relations between the county's many police agencies and Ball's office are seriously strained.

Police—particularly in Newport, where most criminal cases in the county originate—say they have given up hope that their cases will be handled properly by Ball's office. They complain that they seldom are involved once Ball receives a case and almost never are involved when charges are reduced.

Ball says police routinely bungle investigations, forcing his office to salvage cases through plea negotiations. And, Ball says, some police won't accept help on investigations even when he and his assistants offer it.

Campbell Circuit Court Judge Leonard Kopowski is so concerned about the division between police and the prosecutor's office that he hopes to present a plan soon to bridge the gap.

Kopowski says that plan will assure that police and victims are kept informed as cases move through Ball's office.

While Ball and police are supposed to be allies, the two camps seem more at war when they talk about each other. The war involves a number of issues:

Ball's aggressiveness

"Lou is placid, lackadaisical. He never seemed to want to make waves," says Wayne Hetteberg, who was a Newport police officer and a detective for Ball for several years in the 1970s.

"I came to the conclusion as others in the office did that this is going to be it," Hetteberg says. So Hetteberg quit Ball's office in 1978 and returned to police work. Ball says Hetteberg "was a very good investigator but frequently would not do the things assigned to him."

"Lou is comfortable. Nothing would rattle him to do anything," says Jack Bradford, who retired from police work in Ft. Thomas in 1981 and is a former officer of the Fraternal Order of Police Lodge No. 10 in Campbell County.

Ball says he can't remember Bradford ever presenting a case to his office. Although he didn't present cases to Ball, Bradford says he supervised investigations and helped prepare them for the grand jury.

When told police officers describe him as lazy, Ball says he has never heard the complaint.

"I don't like it. I don't agree with it. I have never heard anyone say it. And I'm in contact with those people frequently," Ball says.

Ball's assistant, Kevin Quill, says, instead, that Ball is "principled."

Another assistant, Frank Benton IV, says no one in Ball's office is lazy.

"I'm not lazy. Lou is not lazy. . . . I think there's a simple lack of communication between police and our office. Lou is going to listen (to police concerns). He's not an ogre."

Ball's top assistant, Houston "Hoot" Ebert, says, "Lou is probably the best administrator I've ever seen." Ebert handles the majority of cases in the office. The others are shared by quill and Benton.

Involving police

Police say Ball reduces charges in too many cases and doesn't inform them or involve them in plea negotiations.

David Patchell, a Newport officer who left the force last year, says Ball's practices haven't changed much since 1978, when Patchell joined Newport police.

Patchell, who was Newport's officer assigned to the Northern Kentucky Narcotic Enforcement Unit for several years, blames Ball "for cutting loose too many criminals (especially drug dealers). He turns them right back, and they commit crime after crime. They couldn't have a better friend."

Ball says Patchell often investigated cases poorly, was not prepared to testify and occasionally made deals with drug informants he couldn't keep.

Campbell County Constable Bill Culbertson, who works on investigations with several police departments, says police say that, when they do question Ball's decisions on cases, he often tells them, "That's my prerogative."

Culbertson says, "You find most every case is a carbon copy. There's no participation of police officers prior to the disposition of the case. So cops say, 'Why should I bother.' "

Ball says he can't remember Culbertson ever being involved in a felony case presented to his office. Culbertson says he has worked with police on a variety of cases that police presented to Ball's office.

Ball says he understands why police officers become upset when charges are reduced, but he doesn't believe police understand why his office must negotiate pleas for some cases.

"I don't blame them for feeling this way. I like for them to get that concerned. When they make an arrest, they feel it's their case and they're in charge of that case. Well, that's not necessarily so. When it arrives in this office, obviously we take it over."

Ball also says his office keeps in touch with police on cases.

"If they want to know we'll tell them. Frequently we tell them when they're here. As soon as a judgment is made, they get a letter."

When a case is completed, Ball's office sends a letter listing the defendant's name and the outcome of the defendant's case, but the letters seldom explain how or why that outcome was reached.

Police investigations

Ball says his office often gets stuck with poorly investigated cases that sometimes force him into plea negotiations.

He says he's pleased with most police investigations, but some departments regularly botch cases.

"There are some where there is some turmoil in the department, where it affects the complete operations," he said.

Ball says a recent grand jury strongly criticized some police officers for poorly prepared testimony.

So Ball says he contacted police chiefs in the county hoping to correct the problems.

"If there is a problem, it's that the police do not follow up on their investigations. The problem that we've noticed so often in the past, and we try to encourage the police to overcome it, is when an arrest is made the investigation stops," Ball says.

"They (police) think that as long as a person is in jail that's all that's necessary. But there are all the witnesses to interview."

Juvenile investigations

Ball criticizes some investigations by the Campbell County Juvenile Services Department.

Although he admires the fortitude of juvenile officers, Ball says "some investigations are good and some are bad.

"Sometimes they make a case look better than it may actually be. What we found out when we really get into these cases, some of the things we were led to believe may not really be there," Ball says.

Assistant Campbell County Prosecutor Michael Williams says he's been trying for several years to set up a standard system for juvenile cases. But, Williams says, he can't get Ball interested.

Williams, who works for County Attorney Paul Twehues, prepares juvenile cases for court.

Ball's assessment of juvenile investigations infuriates Williams. "Lou is totally incorrect. If he has a complaint, why am I not given specifics?"

Ball also describes some juvenile officers as "overzealous."

"I think you can be blinded by your desire to help that particular victim. I mean overly want to put that person (the defendant) away forever," Ball says.

"Overzealous," Williams says. "That's ridiculous. We screen out the cases when there is no basis for a charge. Obviously the district judges agree with what we do. We've won nearly every case of sex abuse, except maybe two or three, that we've taken to district court.

"None of his (Ball's) detectives or assistant prosecutors ever work cases with us. If there has been something wrong, why are they afraid to come and tell us?"

Handling the grand jury

Former Commonwealth Detective Hetteberg, Deputy Constable Bradford and Constable Culbertson say Ball doesn't encourage the grand jury to fulfill all of its functions.

Hetteberg and the others say grand juries, in addition to handling cases police take to Ball, also should routinely conduct investigations.

But Ball and his assistants say their office already is swamped with cases and shouldn't expect the grand jury to handle more than it does now.

Newport Mayor Steve Goetz says a tougher commonwealth attorney would encourage the grand jury to dig into a lot more problems. One example, Goetz says, is housing code violations in Newport.

"Newport thinks the grand jury is a dumping ground," says assistant prosecutor Quill. "They've thought that for 30 years."

A "Campbell County Grand Jury Information Sheet," which is given to grand jurors, explains that one of their responsibilities is to conduct investigations. The information on the sheet was derived from the Kentucky Rules of Criminal Procedures.

According to the sheet, "The grand jury's function is to return indictments in criminal cases based on 'sufficient evidence' and/or to investigate matters on its own initiative and make recommendations on their investigations."

Ball says, "I've always prided myself in dealing with the grand jury and in trying to get the best cases possible out of that jury."

While Ball notes that a recent grand jury criticized police preparation, he acknowledges he also has been criticized by several grand juries.

Two grand juries this year recommended that future grand juries be advised more specificially of their duties and responsibilities, and noted jurors should receive a complete briefing on their first day of service.

Ball says he might have neglected to tell the grand juries about some of their duties.

Mending fences

Active police officers echo the sentiments of the former officers.

The sentiment runs strong in Newport, particularly among the city's detectives. The department investigates almost 90 percent of the felony cases handled by Ball's office.

An exception is Dayton, where Police Chief Jerry Early says his department has good relations with Ball.

Most active police officers will say little for publication because they insist Ball will retaliate.

One police chief says Ball "could literally shut this place down. He can make us look like the biggest fools in the world. . . . He has so much latitude and so much power, the layman can't appreciate it."

Ball insists he's not vindictive and doesn't understand why police won't approach him with their grievances.

"Evidentally, the police chief doesn't know me because I don't do things that way. I don't operate that way," Ball says.

One of Ball's two detectives, Harold Guckiean, who is a former Bellevue police officer, says police have never talked to Ball about their complaints.

"Lou will talk about problems. They come to him for advice on other things. I think we're very aggressive."

Seven years ago, Ball met with several officers of the Campbell County Fraternal Order of Police. They met to discuss many of the same grievances that concern active police officers.

Among them was Bradford, who was then on the Ft. Thomas force at the time. Bradford says Ball did nothing to mend the problems, Ball maintains he did.

In a letter a few months after their meeting, Ball encouraged police departments to contact his detectives whenever a major crime was committed in their cities.

Bradford says Ball's detectives seldom were available when police called. "So things were no better than before."

Ball disagrees. He and several of his assistants say police actually ignored their requests.

The prosecutors say they've asked police several times since the letter went out to notify them when a major case breaks, and some officers do regularly.

Assistant prosecutor Benton acknowledges that Ball's office and law enforcement agencies don't communicate as well as they should.

Ball says his office offered to conduct workshops to help officers understand how the commonwealth attorney's office operates and to help them with grand jury and trial preparation.

But Benton says no police department has shown interest. "That is the problem. We're supposed to be on the same team, but they think lawyers look down on them."

Benton worries that police have become too discouraged with Ball's office.

Ball says he wants police officers involved in the final outcome of their cases. "I don't have any problem with that. I would love it."

But he cautions, "I can't say they're going to get their desires and wants because the final decision comes down to here and then to the court."

Ball worries that if police are unhappy, then relations between his office and police might break down. That, he believes, would lead to serious problems.

"I don't want all faith lost in the criminal justice system because of some things that I believe are non-existent," Ball said.

BALL'S RECORD ON PLAZA BINGO AND CINEMA X

[The Kentucky Post—November 19, 1984]

By Al Salvato
Kentucky Post Staff Writer

So much seemed to be at stake.

It was 1983, and Newport Police Chief David Williams had been on the job less than eight months. He thought he saw an opportunity to make a real contribution to cleaning up the much-maligned city.

For then-Campbell Commonwealth Detective Wayne Hetteberg the year was 1977, but the goal was much the same.

Williams wanted to put Jack Kelly, operator of Plaza Bingo, in jail for gambling. That would show that the new chief meant business. So he personally guided the department's six-month investigation of Plaza Bingo to make sure nothing went wrong.

Hetteberg, who worked for Campbell Commonwealth Attorney Lou Ball, wanted to close Cinema X, which specialized in movies later judged obscene, and LeWallen's Variety Store, the adult bookstore on Monmouth Street. He wanted to prove Ball's office was determined to clean up Newport and was tough enough to do it.

The results were not what the two officers expected.

Ball decided the Plaza Bingo case was not as airtight as police believed. He allowed bingo operator Kelly to plead guilty to a minor gambling charge carrying no jail time and a $30,000 fine. At the time, Newport police estimated that Kelly might have skimmed from $150,000 to $300,000 during the six months Plaza Bingo was open.

Hetteberg's investigation of Cinema X and the adult bookstore resulted in fines of $5,000 for the theater and

about $2,500 for the bookstore for obscenity, but the operations remained open. After that, Hetteberg says, Ball rebuffed the detective's requests to continue investigating the operations Hetteberg wanted to close down.

Ball's handling of cases, including Plaza Bingo and Cinema X and the bookstore, has upset some police officers and others involved in law enforcement. Police point to the two cases because of their size and notoriety.

The Plaza Bingo case

Jack Kelly opened Plaza Bingo in April 1983. Not long after the bingo opened its doors, Newport police officers were inside watching and playing, and outside sifting through dumpsters to gather up bags of discarded receipts.

Police Chief Williams and Lt. C. I. Rick Huck were sure bingo operator Kelly was running an illegal gambling operation.

The thoroughness of Newport's investigation impressed County Attorney Paul Twehues. "I thought Plaza Bingo was a good case,' says Twehues, who assisted in the investigation.

Because of the importance of the case, police chief Williams kept Mayor Steve Goetz, former city manager Ralph Mussman and former city attorney Wil Schroder abreast of the investigation, assuring them that it was solid.

"I felt they had Kelly nailed to the cross," Mussman says.

Six months after Plaza Bingo opened, Newport police dropped their investigation into Ball's lap.

After they raided and closed Plaza Bingo, police charged Kelly and his corporation, NKF Inc., with promoting gambling. The charges, both felonies, carried a possible prison sentence of one to five years.

At the time police said they could prove that as much as $1,500 to $3,000 a night had been skimmed off proceeds

that were supposed to go to charity—the Cystic Fibrosis League of Greater Cincinnati. Police also said they could prove Kelly paid bingo workers.

Bingo is legal in Kentucky only when all proceeds go to charity, it is run by a charity, and its workers are volunteers.

Once Ball had the case, he says, he worked closely with Newport police to tie together the loose ends. He says he never could.

"The case was just not ready. I believe the police at the time of the raid were made to believe it could go to trial the next week."

Ball says he discussed the case with a number of Newport officers, some city officials and Twehues.

"And I started to tell them the problems we were going to have . . . . At that time, they agreed with me that we have a lot of work to do.

"We had a lot of things in the case that indicated that the magnitude of the crime could have been limitless—a tremendous amount of money. But there was nothing truly factual that it broke down to.

"I believe I had a figure one time of $250,000," from police, Ball says. But he says he could not pin down the specific amount of money police said Kelly had taken.

Ball's assistant, Kevin Quill, who worked on the Plaza Bingo case, says the case also hinged on the testimony of six people who police identified as Kelly's paid workers at the bingo. But those people refused to testify before a grand jury and were cited for contempt of court, Quill says.

A judge ordered them jailed but released them on bond. The issue was eventually sent to the Kentucky Court of Appeals but never settled, and the witnesses were never jailed.

Quill says losing those witnesses blew the case.

"It was difficult to reach a burden of proof on evidence against Jack Kelly. There was no strong trail of evidence against him," Quill says.

Meanwhile, the Covington police department launched its own bingo investigation of the Variety Room, and asked Newport police for help.

Covington police eventually used Newport's investigation of Plaza Bingo as a model.

Covington Detectives Henry Warden and Janet Radenheimer, who coordinated Covington's investigation, say they thought Newport's investigation was excellent.

A grand jury in Kenton County has indicted the bingo operator on 54 counts, and the case is pending.

The Plaza Bingo case ended in June, eight months after the raid, when Kelly pleaded guilty to facilitation to gambling, a misdemeanor, and was fined $30,000. Ball had decided there was not enough evidence to convict kelly on a felony.

Kelly also pleaded guilty, as the owner of NKF Inc., to promoting gambling in the first degree, a felony, and was placed on probation for two years upon Ball's recommendation.

Ball says he felt the outcome of the Plaza Bingo case was a major accomplishment. "The only thing we were concerned about was closing the bingo, getting that thing out of the area." The bingo was closed after the raid.

Ball says Newport police realized their case was weak and accepted the outcome.

"Some of the police officers that I dealt with in that case were very pleased with the outcome. They agreed that that was the greatest outcome they ever heard of," Ball says.

Assistant Prosecutor Quill says, "The police agreed to everything that happened."

Newport police officers say they expected kelly to go to jail. "I felt we even had sufficient evidence for additional criminal charges," Lt. Col. Huck says.

Police Chief Williams complained to Ball about his handling of the case, according to Schroder, then city attorney and now a Kenton County District Court judge.

Williams and Huck also asked Schroder for help. "They asked if we (the city) could do something. My advice was I didn't have any control over the commonwealth attorney," Schroder says.

Schroder says the police knew what they were doing during the bingo investigation. "From my reading of the case, Jack Kelly was the principal. His violation was a felony, not a misdemeanor."

Ball's decision made city officials furious.

"I wasn't satisfied at all," Mayor Goetz said. "He (Kelly) was given only a slap on the wrist."

Former Newport City Manager Mussman winces when he thinks of Ball's decision on Plaza Bingo.

"I resent it when a guy (Kelly), an outsider from Ohio, comes in town and makes a fool of you," he said. Kelly, who once operated the Cabooze liquor store in Newport, lives in Cincinnati. Kelly could not be reached for comment.

Ball says his decisions aren't always popular.

"You can't please everybody all the time."

He also says the $30,000 fine reimbursed the city for the cost of its police investigation. Mayor Goetz says the city spent about $25,000 on the investigation.

Cinema X, the adult bookstore

Shortly after Wayne Hetteberg, who then worked for Ball as a detective, began investigating Cinema X and the adult bookstore in 1977, he decided he needed the advice of Hamilton County, Ohio, prosecutor Simon Leis.

Leis, now a Hamilton County common pleas judge, is renowned for his crusades against pornography.

Hetteberg says he convinced Ball to meet with Leis and map out a plan to shut down the operations. According to Hetteberg, Leis told Ball that as the top prosecutor in the county: "You can do anything you want to do. Just go out and get the job done. Just be strong."

Hetteberg says, "Lou never really listened to that."

Leis says too many prosecutors won't enforce their own state's obscenity laws and it angers him.

Leis says he would have done something about Newport's problems with pornography and nightlife years ago.

Hetteberg says his investigation led to fines for Cinema X and the adult bookstore, but he never was given the opportunity to continue trying to close the operations.

Hetteberg quit Ball's office in 1978 and returned to police work in Newport. Hetteberg is now out of police work and living in Florida.

Ball notes that his office was the first to investigate Cinema X and the adult bookstore, and the first to get a conviction.

"We were the first ones in it. We confiscated the films right out of the place and brought them to the courthouse and played them to the grand jury and obtained a conviction in the case."

Ball says the major reason his office did not continue to pursue its investigation of the theater and bookstore

was that they were committing misdemeanors. Minor crimes, Ball says, are the county attorney's responsibility.

In mid-1978 Kentucky law changed, making the offenses involved in the case misdemeanors. Hetteberg's investigation took place in 1977, when the offenses were classified as felonies, which fell under Ball's jurisdiction.

An investigation by County Attorney Twehues' office in 1980 led to the closing of both operations.

Police say Ball was not involved in that investigation, despite a request from Twehues. Again, Ball says he did not get involved because the offenses were misdemeanors.

Twehues says his office needed to know who owned the theater and the adult bookstore to prosecute them. As county attorney, Twehues could subpoena records that would show who owned the operations, but the owners would not have to produce those records until their cases went to trial. That would have delayed the case, except that an investigation by The Kentucky Post revealed the names of the owners.

Twehues says Ball could have asked a grand jury to compel the theater and bookstore owners to present evidence of ownership before trial.

After several raids, a jury, ruling on the investigation by the county attorney's office, found the material obscene. The theater and bookstore repeatedly were fined. After the owners failed to pay the fines, the operations were closed.

"He (Twehues) should have gotten the credit for that. I don't have any problem with that. I'm not in a rivalry with Paul," Ball says.

OUR CHALLENGE TO LOU BALL

[The Kentucky Post (Editorial)—November 26, 1984]

Listen to the way Campbell County's criminal justice team is talking:

The police say the prosecutor ignores them. They say he gives too many breaks to too many criminals. They say he's lazy.

The prosecutor says he works hard, but the police bungle too many cases. He says he's tried to help them but they won't listen.

A judge says he's had to push to get cases handled quickly, and now he's working on a plan to patch things up between the prosecutor and the police.

Does that sound like a winning team?

No, and neither do some statistics from the scoreboard.

During the last five years, Campbell County convicted 18.2 percent of its persistent felony offender defendants in its best year, while Kenton County convicted fewer than 60 percent in its worst year.

So far this year, Campbell County has dismissed 81.6 of its persistent felony offender cases while Kenton County has convicted 83.3 percent.

Over the last five years, about 52 percent of all the felony defendants in Campbell County have pleaded guilty to lesser charges while just 9 percent have escaped with lesser charges in Kenton County.

As the Campbell County public confronts this unhappy record, it must ask itself what should be done to set things right.

Are the police so bad? Should they be replaced? Retrained?

Should a new prosecutor replace Commonwealth Attorney Lou Ball?

Would Judge Len Kopowski's forthcoming plan to improve police-prosecutor communications be a solution?

Those aren't easy questions. A wise approach might be to think them through this way:

First, problems in Campbell County's various police departments can't be ignored. Two grand juries have complained about poor case preparation in Bellevue. Poor morale and political meddling trouble several suburban departments. Memories of past corruption still haunt Newport, the county's largest.

Most of the county's felony cases come from Newport. So do most of the complaints about Mr. Ball. The department's past problems can't be denied, but the Newport Police Department has improved considerably in the last few years. If the city can find a way to improve its officers' salaries, the public can count on continued police improvements in Newport—with or without Mr. Ball's help.

Mr. Ball's help is more important to the smaller departments. He says he has offered to help these departments improve, but Mr. Ball missed an especially promising opportunity this year during a grand jury investigation into the office of Bellevue Police Chief Elmer Corbin, who presides over a department that has been torn apart by accusations of poor administration and improper behavior.

Problems raised by the police can't be ignored, either.

The police say the prosecutor does not aggressively enforce the persistent felony offender statutes, and the record backs them up.

They say he often lets felony defendants plead guilty to lesser charges, and the record backs them up.

They say he has not aggressively attacked the adult entertainment and gambling underworld that corrupted

Newport government for so many years and that is always just an election away from being able to do so again. City officials and county prosecutors back them up.

Judge Kopowski's determination to improve communications between Mr. Ball and the police is a happy note in all this, but Mr. Ball will have to be more than a good communicator to regain a position of leadership on Campbell County's criminal justice team.

He can lead effectively only if he is respected—publicly and privately. And he will be respected only when he starts playing the game to win.

Three years remain on Mr. Ball's term of office. An unhappy public could ask him to resign, but the public might be better served if it looked to Mr. Ball's promise.

He is, after all, a well trained lawyer with considerable experience in criminal prosecution. No other member of the Campbell County bar has ever opposed him in an election. Even police officers, for the most part, will criticize him from the distance of retirement or from behind the veil of anonymity.

No one has ever really stood and demanded in a loud voice that Mr. Ball be any better than he is right now.

We call now on Mr. Ball to improve his record, to reach his potential as a prosecutor. We call on him to prosecute felons as felons and to put repeated felony offenders in prison for the maximum term. We call on him to lead the charge by personally trying the most serious cases in court.

We call on him to set a high standard for police work in Campbell County, and we call on the police to meet it. Although we do not know all the details of Judge Kopowski's plan for improved communications, we call on all parties to support the principle and make it work.

And we call on the Campbell County public to take this contest against crime more seriously. Police departments

that drew grand jury reprimands should be reorganized, and a prosecutor with a record like Mr. Ball's should not be accepted unquestioningly by people who are concerned about public safety.

We belive [sic] Lou Ball possesses the ability to turn around his office's record on crime and that the residents of Campbell County possess the resolve to expect it of him.

If we are wrong about that, if the public fails and Mr. Ball fails, the only winner will be crime.

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

No. 84-CI-1097
Special Judge Kelley Asbury

LOUIS A. BALL,

PLAINTIFF

v.

THE KENTUCKY POST, *et al.*,

DEFENDANTS

INTERROGATORIES TO THE JURY

You are requested to answer the following interrogatories, if applicable, in the answer spaces provided. Please sign your name in the space provided if you concur in the answer given.

Interrogatory No. 1

Are you satisfied from the evidence that any of the statements complained about by plaintiff, when read in context, were false and not substantially true?

Answer Yes or No: ___

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If your answer to this Interrogatory is "No," do not answer any further Interrogatories.

Interrogatory No. 2

If your answer to Interrogatory No. 1 is "Yes," list those statements which you find to be false and not substantially true.

Answer:

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Interrogatory No. 3

Are you satisfied from the evidence that any of the statements listed in answer to Interrogatory No. 2 were of and concerning plaintiff rather than another person?

Answer Yes or No: ___

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If your answer to this Interrogatory is "No," do not answer any further Interrogatories.

Interrogatory No. 4

If your answer to Interrogatory No. 3 is "Yes," repeat those false statements listed in answer to Interrogatory No. 2 that you find to be of and concerning plaintiff.

Answer:

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Interrogatory No. 5

Are you satisfied from the evidence that any of the statements listed in answer to Interrogatory No. 4 were defamatory of plaintiff?

Answer Yes or No: ___

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If your answer to this Interrogatory is "No," do not answer any further Interrogatories.

Interrogatory No. 6

If your answer to Interrogatory No. 5 is "Yes," repeat those false statements which are of and concerning plaintiff, listed in answer to Interrogatory No. 4, which you also find to be defamatory of plaintiff.

Answer:

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Interrogatory No. 7

Do you find by clear and convincing evidence that the defendants published any statement listed in response to Interrogatory No. 6 with knowledge that the statement was false or with a high degree of awareness that it was probably false?

Answer Yes or No: ___

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If your answer to this Interrogatory is "No," do not answer any further Interrogatories.

Interrogatory No. 8

If your answer to Interrogatory No. 7 is "Yes," repeat each statement listed in response to Interrogatory No. 6 that you are clearly convinced was published by defendants with knowledge that the statement was false or with a high degree of awareness that is was probably false.

Answer:

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Interrogatory No. 9

Do you find from the evidence that any of the statements listed in response to interrogatory N. 8 were protected by the privilege to publish opinions, even opinions which reflect negatively upon the plaintiff?

Answer Yes or No: ___

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Interrogatory No. 10

If your answer to Interrogatory No. 9 is "Yes," repeat those statements listed in response to Interrogatory No. 8 that you find to be protected by the privilege to publish opinions.

Answer:

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If you answered Interrogatory No. 10 by repeating every statement listed in response to Interrogatory No. 8, do not answer any further Interrogatories.

Interrogatory No. 11

If you find that any statements complained of, taken in context, were false and not substantially true, were of and concerning plaintiff, were defamatory, were not privileged, and were published by the defendants with knowledge of their falsity or a high degree of awareness that they were probably false, then are you satisfied from the evidence that any of those statements are the direct and proximate cause of any actual injury to plaintiff?

Answer Yes or No: ___

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If your answer to this Interrogatory is "No," do not answer any further Interrogatories.

Interrogatory No. 12

If your answer to Interrogatory No. 11 is "Yes," repeat each statement listed in answer to Interrogatory No. 8 that you find to be the direct and proximate cause of actual injury to plaintiff.

Answer:

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Interrogatory No. 13

If your answer to Interrogatory No. 11 is "Yes," state the actual injury that you find to have been suffered by plaintiff as a direct and proximate result of the publication of the statements listed in answer to Interrogatory No. 12.

Answer:

Each juror concurring in the above:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

FILED

NOV 20 1985

CAMPBELL CIRCUIT COURT
THOMAS J. CALME, CLERK

INSTRUCTION NO. I

If you find from the evidence that any of the statements complained of when read in context were

(a) false statements of fact,

(b) defamatory,

(c) of and concerning the plaintiff, Louis A. Ball, and

(d) that it is clear and convincing that the defendant, Al Savato, acted out of actual malice in making the statements complained of, you will find for the plaintiff, Louis A. Ball.

INSTRUCTION NO. II

"*Defamatory statements*" are statements that tend to:

(1) Bring a person into public hatred, contempt or ridicule,

(2) Cause him to be shunned or avoided or

(3) Injure him in his business or occupation.

"*Actual malice*" as used in these instructions means knowledge of the falsity of a statement or statements that are defamatory or a high degree of awareness that the statement or statements are false.

"*False statements*" as used in these instructions means statements which are not substantially true.

INSTRUCTION NO. III

If you find for the plaintiff, you will award him such damages as you believe from the evidence will compensate him for such of the following damages as he has sustained directly and as a result of the publishing of any defamatory statements as follows:

(a) Damages to the reputation of Louis A. Ball, if any,

(b) Mental distress of Louis A. Ball, if any.

INSTRUCTION NO. IV

If you find for the plaintiff under Instruction No. I and further award the plaintiff damages under Instruction No. III, you may in your discretion award punitive damages in such sum as you determine fair and reasonable.

INSTRUCTION NO. V

Nine or more of you may reach a verdict. If all of you agree upon a verdict, then only the foreman need sign. If nine or more agree, then the nine or more agreeing need to sign.

INSTRUCTION NO. VI

FORM VERDICT

We, the jury agree and find for the defendant.

_____

FOREPERSON

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

(OR NINE OR MORES [sic.]
IF
NOT UNANIMOUS)

INSTRUCTION NO. VII

FORM VERDICT

We, the jury agree and find for the plaintiff and award him damages under Instruction No. III in the sum of $ 175,000.00.

Shellee Wagner
FOREPERSON

/s/ Vicki Thompson
Audrey Clift
Anne P. Perry
Sandy Boesch
Daniel C. Mangulabnan
Robert E. Taylor
Edward W. Braun
Harold W. Dedman
Hagan Baker
Louis J. Schmidt
Shellee Wagner
(OR NINE OR MORE IF NOT UNANIMOUS)

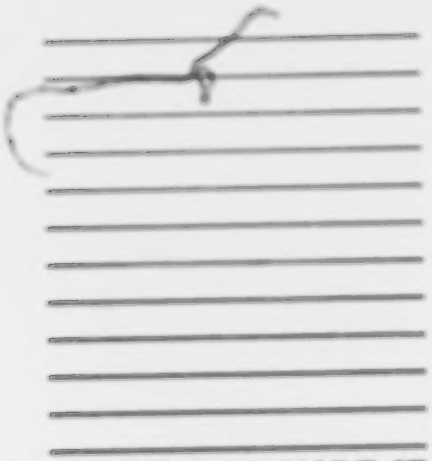
INSTRUCTION NO. VIII

FORM VERDICT

We, the jury agree and award for the plaintiff punitive damages in the sum of $ ____.

_____

FOREPERSON



(OR NINE OR MORE IF NOT UNANIMOUS)

(2)

No. 90-1354

FILED
MAR 29 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

E. W. SCRIPPS COMPANY,
THE KENTUCKY POST,
AL SALVATO - - - - - - - Petitioners

versus

LOUIS A. BALL - - - - - - - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK V. BENTON III
BENTON, BENTON & LUEDEKE
18 North Fort Thomas Avenue
Fort Thomas, Kentucky 41075
606/781-2345
Counsel of Record
for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3331, LOUISVILLE, KY.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ..... ii–iii

STATEMENT OF FACTS 1

RESPONDENT'S REPLY TO QUESTIONS PRESENTED FOR REVIEW 1–25

I. The Proposed Procedural Safeguard Of Special Interrogatories Is Not Essential To The Protection Of Freedom Of Expression 1–4

II. The Kentucky Supreme Court Properly Applied The Standard Of Independent Review Adopted By The Court In *Harte-Hanks Communications, Inc.* v. *Connaughton* 4–11

III. The Evidence Of Record, Believed By The Jury, Clearly And Convincingly Evidences Constitutional Malice 11–25

A. The "Ballard Gayhart" Libel 11–14

B. The "Patchell"—"Crime After Crime" Libel. 14–16

C. The Distorted Statistic Libels 16–20

D. The "Scores Of Delays" Libel 20–24

E. The "Cinema X" Libel 24–25

CONCLUSION 25–27

TABLE OF AUTHORITIES

Cases: PAGE

New York Times Co. v. *Sullivan*, 376 U.S. 254, (1964) 2, 4, 6
Time, Inc. v. *Firestone*, 424 U.S. 448 (1976) 2, 4, 8
Herbert v. *Lando*, 441 U.S. 153 (1979) 2
Keeton v. *Hustler Magazine*, 465 U.S. 770 (1984) 2
Calder v. *Jones*, 465 U.S. 783 (1984) 2
Butts v. *Associated Press*, 388 U.S. 130 (1967) 2
Gertz v. *Robert Welch*, 418 U.S. 323 (1974) 2, 4
Cantrell v. *Forest City Publishing Co.*, 419 U.S. 245 (1974) 2–3
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986). 3
Young v. *J. B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky., 1989) 3
Dun & Bradstreet v. *Greenmoss Builders*, 472 U.S. 749 (1985) 4
Bose Corporation v. *Consumer Union*, 466 U.S. 485 (1984) 5, 6
Tavoularees v. *Piro*, 817 F. 2d 762 (D.C. Cire. 1987) *cert. den.* 484 U.S. 870 (1987) 5
Harte-Hanks Communications, Inc. v. *Connaughton*, 109 S.Ct. (1989) 5, 6, 7, 8, 9, 12, 13, 16, 25
Herron v. *King Broadcasting Co.*, 776 F.2d 98, 107 (Wash. 1989) 8
Cochran v. *Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211 (Ct. App. Ind. 1978) 8
Arber v. *Stahlen*, 170 N.W.2d 45, 48 (Mich. 1969) *cert. denied*, 397 U.S. 924 (1970) 8
Cape Publications, Inc. v. *Adams*, 336 So.2d 1197 (Dt. Ct. App. Fla. 1976), *cert. denied*, 434 U.S. 943 (1977) 8
Indianapolis Newspapers, Inc. v. *Fields*, 259 N.E.2d 651 (Ind. 1970), *cert. denied*, 400 U.S. 930 (1970) .. 8
Carey v. *Hume*, 390 F. Supp. 1026, (D.D.C. 1975), *aff'd*, 543 F.2d 1389 (D.C. Cir. 1976) 10

Cases: PAGE

Goldwater v. *Ginsburg*, 414 F.2d 324 (2nd Cir. 1969) *cert. denied*, 396 U.S. 1049 (1970) 11

St. Amant v. *Thompson*, 390 U.S. 727 (1968) ... 12, 15, 20, 23

Pep v. *Newsweek*, 553 F.Supp. 1000 (S.D.N.Y. 1983) .. 12

Alioto v. *Cowles Communications, Inc.*, 430 F.Supp. 1363 (N.D. Cal. 1977), *aff'd* 623 F.2d 616 (9th Cir. 1980) *cert. denied*, 449 U.S. 1102 (1981) 12–13

Mehau v. *Gannett Pacific Corp.*, 658 P.2d 312 (Haw. 1983) 13

Gertz v. *Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982) *cert. denied*, 459 U.S. 1226 (1983) 13, 19

Westmoreland v. *CBS, Inc.*, 596 F.Supp. 1170 (S.D. N.Y. 1984) 14, 23

Cantrell v. *Forest City Publishing Co.*, 419 U.S. 245 (1974) 19

Hunt v. *Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983) . 19

Schiavone Const. Co. v. *Time, Inc.*, 847 F.2d 1069 (3rd Cir. 1988) 19

Brown & Williamson Tobacco Co v. *Jacobson*, 827 F.2d 1119 (7th Cir. 1987) 23

Levine v. *CMP Publications*, 738 F.2d 660 (5th Cir. 1984) 23

Other Authorities:

B. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* 331 (1985) 25

No. 90-1354

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

E. W. Scripps Company,
The Kentucky Post,
Al Salvato - - - - - - - - - *Petitioners*

v.

Louis A. Ball - - - - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Respondent adopts as his statement of facts, those summarized by the Supreme Court of Kentucky in its opinion, reprinted in the Petition. (Pet. 4a - 6a), and those mentioned in the body of this brief, particularly in the Conclusion.

REPONDENT'S REPLY TO QUESTIONS PRESENTED FOR REVIEW.

I. The Proposed Procedural Safeguard Of Special Interrogatories Is Not Essential To The Protection Of Freedom Of Expression.

The Petitioner's special interrogatories argument was presented to the Kentucky Supreme Court, which rejected it as not properly saved by specific objection under the Kentucky rules, and because the interrogatories submitted were "unsuitable and unreasonable." (Pet. 13a) Under

controlling precedent, the Court is "foreclosed" from reviewing such a determination unless the Court finds "this ruling 'lacks fair or substantial support' in prior (Kentucky) decisions." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 264, n. 4 (1964). Neither the requirements of the First Amendment nor the Fourteenth Amendment Due Process Clause mandate the highly formalized and complicated procedure suggested by Petitioner. Indeed, the novel, if not radical, nature of this proposal is amply evidenced by the absence of *any* libel precedent cited by the Petitioners which requires such special interrogatories as a matter of federal constitutional law.

The Court has rejected numerous suggestions of Due Process and/or First Amendment-based special restrictions on libel trials in addition to the "rather drastic limitations" of the *New York Times* decision. *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976) at 457. Thus, there is no requirement of special evidentiary rules protecting the editorial process, *Herbert* v. *Lando*, 441 U.S. 153 (1979), 169-76, or a mini-trial on falsity as a precondition to discovery of such information, *id.* at 174-75, n. 23, or residency as a precondition to libel jurisdiction, *Keeton* v. *Hustler Magazine*, 465 U.S. 770, 780-81 (1984), or a limitation on nationwide damages under the "single publication" rule, *id.* at 774-76, or a special jurisdictional immunity of individual reporters or editors writing in their official capacity, *Calder* v. *Jones*, 465 U.S. 783, 786-91 (1984), or that determinations of constitutional fault be by a jury rather than an appellate court, in the first instance, *Firestone*, 424 U.S. at 461-63, or a higher level of fault for punitive damages than for compensatory damages, *Butts* v. *Associated Press*, 338 U.S. 130, 160-61, (1967), *Gertz* v. *Robert Welch*, 418 U.S. 323, 349-350 (1974), or special rules of vicarious liability. *Can-*

trell v. *Forest City Publishing Co.*, 419 U.S. 245, 253 (1974). As the Court has repeatedly indicated, it has "already declined in other contexts to grant special procedural protections to defendants in addition to the constitutional protections embodied in the substantive laws." *Calder*, 465 U.S. at 790-91; *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256, n. 7 (1986)

A brief perusal of the Kentucky approach evidences clearly the meritless nature of Petitioners' argument for radical transformation of Kentucky law. In the decision of *Young* v. *J. B. Hunt Transp., Inc.*, 781 S.W.2d 503, 506-07 (Ky., 1989), the Kentucky Supreme Court described its traditional posture as to use of "bare bones" instructions with "supplementation, elaboration, and detailed explanation [of them] falling within the realm of advocacy:"

> Contrary to the practice in some jurisdictions where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to *confine the judge's function to the bare essentials and let counsel see to it that the jury clearly understands what the instructions mean and what they do not mean* . . . " [it is] clear that in the absence of a compelling reason to do otherwise, *counsel is entitled to considerable latitude* during argument . . . The *best way to safeguard litigants' rights to a fair verdict is to allow counsel to inform the jury of the legal effect* [of apportionment of liability] *and argue the significance of such determination in the context of the overall result. In so doing, counsel will not have to wonder what the jury knows or suspects and will be able to fully and accurately argue the case upon the evidence presented and confront the jury with the instructions of the court.* (emphases supplied).

In other words, Kentucky requires in libel litigation that the "bare bones" of the controlling First Amendment doctrine be contained in the instructions (which the court in *Ball* found and Petitioners do not deny), and that counsel have "considerable latitude" in discussing them and applying them to the facts. Both Petitioners' (T. 1639-59) and Respondent's (T. 1660-77) trial counsel took advantage of this entitlement and discussed the law and facts in detail. Indeed, Petitioners' trial counsel took substantial literary license with the *New York Times* criterion, repeatedly stating that Respondent must show knowing falsity (T. 1645, 1650, 1657, 1658, 1659).

In order to adopt petitioners' proposal the Court would have to discard its traditional deference to the states once the minimal constitutional threshold requirements are met, *Gertz*, 418 U.S. at 347-48, *Dun & Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749, 757-63 (1985), and its specific deference to state courts which have "wide experience in framing appropriate jury instructions in tort actions." *Gertz*, 418 U.S. at 350. Indeed, the Court has heretofore explicitly rejected any such constitutionally-mandated, highly intrusive revision of state tort law allocations of fact-finding responsibilities: "The First and Fourteenth Amendments do not impose upon the State *any limitations as to how, within their own judicial systems, fact-finding tasks shall be allocated*," (emphases supplied). *Firestone*, 424 U.S. at 461.

II. The Kentucky Supreme Court Properly Applied The Standard Of Independent Review Adopted By The Court In *Harte-Hanks Communications, Inc.* v. *Connaughton*.

The Petitioners' disparaging attack on the methodology of and resulting determination by the Kentucky Supreme Court lacks merit when measured against the Sixth Circuit

opinion in *Herte-Hanks* and the Supreme Court's opinion in affirmance. The Sixth Circuit's opinion interpreted *Bose Corporation* v. *Consumer Union*, 466 U.S. 485 (1984), as not requiring an independent—de novo review of "preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but . . . [as] limited to a review of the ultimate conclusion of clear and convincing proof of actual malice." Any "contrary conclusion would usurp the role of jury . . . impinging a plaintiff's constitutional right to a jury trial." 842 F.2d 825, 842 (6th Cir. 1988). The court explicitly rejected the view of *Tavoulareas* v. *Piro.*, 817 F.2d 762 (D.C. Cire. 1987) *cert den.* 484 U.S. 870 (1987), which had rejudged the credibility of witnesses without the direct opportunity for observance, and reevaluated the weight of the evidence, denying thereby the plaintiff's right to a jury trial and the entitlement to "all reasonable inferences therefrom to be viewed in the light most favorable to the plaintiff." *Harte-Hanks*, 842 F.2d at 842. n. 11. The court then applied a "clearly erroneous" analysis to the subsidiary or operative facts "as reflected in the entire record of the evidence and assigning 'due regard' to the jury's opportunity to observe the demeanor of the witnesses . . ." It held that it was "unable to conclude that it is 'left with a definite and firm conviction that a mistake has been committed' by the jury in arriving at its subsidiary factual findings," i.e., it was not "clearly erroneous". *Id.* at 844.

The Sixth Circuit then reviewed the "entire record" to determine whether the "ultimate" conclusion of constitutional law, the constitutional malice—clear and convincing evidence standard, had been met. The court—having accepted the jury's finding as to subsidiary or operative facts "that bear up the issue of 'actual malice' as those facts

are mirrored by the record in its entirely" and having accepted "all reasonable inferences therefrom, including assessment of credibility in favor of the plaintiff"—then undertook an "overview or 'second look'" at the "entire record" as a precursor to its exercise of independent judgment on the "ultimate" constitutional fact. *Id.* at 845. This included evidence of motive and other circumstances evidencing the defendants' purpose and intent in making the publication. *Id.* Lastly, the court concluded that, viewed in the above framework, "(w)eighing the cumulative impact" of the subsidiary facts, the plaintiff had met the *New York Times* standard. *Id.* at 846.

The Supreme Court's majority opinion undoubtedly adopted the "most significant element" of the Sixth Circuit's opinion—deference to jury credibility determinations—as to at least "the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S.Ct. 2768, 2701 (1989) (Scalia, J., concurring). Justice Kennedy found the majority's opinion not inconsistent with that of Justice Scalia, *id.* at 2700 (Kennedy, J., concurring), who adopted the view of the Sixth Circuit in its entirety, and found no justification for the Court majority's deference to only a limited number of permissible findings. Justice Scalia concluded that, in making the required individual assessment under *Bose—New York Times*, the Court must assume that the jury "made all the supportive findings it reasonably could have made." The courts have traditionally given such deference and "there is ultimately no alternative to it." *Id.* at 2701 (Scalia, J., concurring).

An unbiased analysis of the Kentucky Supreme Court's opinion evidences clearly that it followed the methodology

and approach of the Sixth Circuit and Supreme Court in *Harte-Hanks*. The Court developed in detail the subsidiary facts evidencing constitutional malice (Pet. 2a-6a) and then synthesized the defamatory matters complained of (Pet. 6a - 7a). It then concluded that "substantial evidence" supported the false and defamatory nature of the listed libels (Pet. 7a). Next, it discussed in detail its approach to independent review of the issue of constitutional malice by clear and convincing evidence. Noting the "*great deal of conflict*" in the testimony "as to what the witnesses were actually saying *when their various answers were compared one with another*," the court concluded that "*(i)solated answers are often ambiguous, so the question then becomes what is the import of the answer when considered in context*" (emphases supplied). Lastly, it followed the *Harte-Hanks* approach as to "underlying subsidiary or historical facts" and, as to conflicts in the evidence, concluded that review "still must be in terms of what the jury could find as the bare facts and what the jury *could reasonably infer from the testimony of witnesses when considered as a whole*" (emphases supplied). It accepted the jury's finding "when there is supporting evidence because we claim no superior ability to divine the truth by reason of judicial office . . ." (Pet. 8a).

Despite the double briefing and oral arguments with extensive references to the record, the court's aforesaid analysis and its reiterated conclusion that it found the ultimate constitutional fact—constitutional malice by clear and convincing evidence—to be met (Pet. 9a - 10a, 14a), Petitioners petulantly complain of the court's failure to analyze the evidence in detail. Petitioner's doubtlessly proceed in a faulty premise. The Court has rejected the contention that the Constitution requires that "in a libel

action an appellate court treat in detail by written opinion all contentions of the parties" — all that is required is a "conscious determination" of compliance with the appropriate fault standard. *Firestone*, 424 U.S. at 463. In truth, Petitioners' main concern appears to be the Kentucky Supreme Court's refusal to arbitrarily select a few pivotal facts for deference, and its application of the deferential standard to *all* determinations of fact by the jury. However, the court correctly construed *Harte-Hanks* in concluding that the Court's opinion is, "if not coextensive" with that of the Sixth Circuit, "seems nearly so" (Pet. 10a). The court's opinion on wholly inclusive deference to the jury is persuasive and is the only logical conclusion to be adopted from an analysis of and comparison of the Court's majority and concurring opinions.

Petitioners' self-righteous analysis of the common law malice issue as to the circumstances precipitating the series does not deny the basic facts in question — it only denies the *reasonableness of the inference* as to Petitioners' motivation therefrom. In other words, it is asking the Court to reject the *jury's decision* finding such linkage and substitute its *own inferences* in place thereof — a request contrary to the Court's standard of review in *Harte-Hanks*. The law is clear. Motivation to "get" Respondent was and is relevant evidence as to constitutional malice. *Herron* v. *King Broadcasting Co.*, 776 P.2d 98, 107 (Wash. 1989); *Cochran* v. *Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1221-22 (Ct.App.Ind. 1978); *Arber* v. *Stahlen*, 170 N.W.2d 45, 48 (Mich. 1969), *cert. denied*, 397 U.S. 924 (1970); *Cape Publications, Inc.* v. *Adams*, 336 So.2d 1197, 1199-1200 (Dt. Ct.App.Fla. 1976), *cert. denied*, 434 U.S. 943 (1977); *Indianapolis Newspapers, Inc.* v. *Fields*, 259 N.E.2d 651, 653-664 (Ind. 1970), *cert. denied*, 400 U.S. 930 (1970).

Petitioners' suggestion that no competent evidence of such a nexus — between the Bellevue investigations and Petitioners' articles — was admitted is laughable. Joe Chandler, a Bellevue police officer, was called to Bellevue High School in 1982 when Salvato was accused of trying to get three high school girls to do drugs with him. Salvato was not arrested but was ejected from the game (T. 802-04).

In 1983, Salvato worked on a Bellevue drug investigation with Assistant Chief Brumbach and Dave Patchell (T. 369-71) [whose libel is discussed, *infra*]. The former called Salvato concerning problems with the Bellevue police department (T. 375), which had become extremely divided with the Brumbach faction opposed to Chief Corbin and two other officers, including Joe Chandler (T. 377-78). At the conclusion of a state police investigation resulting from articles in *The Kentucky Post* a grand jury was convened but failed to indict anyone on the Bellevue force (T. 131). This failure resulted in the displeasure of *The Kentucky Post* and its editorial of July 2, 1984, denominating Respondent as "timid" (Pet. 28a). Shortly thereafter, Respondent and Salvato had a telephone conversation in which Salvato warned Respondent that, in substance, he would be "hearing" from Petitioners (T. 131-32). Salvato's "investigation" commenced shortly thereafter.

Based on these facts, the jury had reasonable and admissible evidence of a motive by Petitioners to "get" Respondent — clearly admissible under the precedent aforesaid.

The Petitioners' contention that the July 2, 1984 and November 26, 1984, articles were prejudicially allowed to be considered as evidence of constitutional malice is also without foundation. The Court allowed as evidence of constitutional malice in *Harte-Hanks* a prior editorial (not

complained of as defamatory) which "set the stage" for the later defamatory articles. 109 S.Ct. at 2694.

Petitioners likewise complain that the Kentucky Supreme Court's reference to "other evidence from witnesses too extensive to detail" of Salvato's "grudge" against Respondent (Pet. 6a) is without foundation in the record. This contention is specious. The selective use of information, the refusal to consider or review available contradictory information or sources, and the omission of matter contradicting Salvato's thesis are evidence of both common law and constitutional malice and are dealt with in more detail hereinafter. A few other illustrations are worthy of note.

Salvato declined to interview a Kentucky State Policeman when he concluded that he was quite complimentary of Respondent (T. 768-69). Similarly, Salvato interviewed a defense lawyer but terminated the interview when he disagreed with Salvato's position on Respondent (T. 664-665). Clearly, Salvato was attempting to solicit negative comments from interviewees, a motivation that evidences "an attitude disinclined towards the truth." *Cochran*, 372 N.E. 2d at 1221-11. At another point, Salvato misrepresented Judge Kopowski's plan "to bridge the gap between the prosecutor's office and the police" (T. 733). Such deliberate misquotation or misuse of a source is supporting evidence of constitutional malice. *Carey* v. *Hume*, 390 F. Supp. 1026, 1030 (D.D.C. 1975), *aff'd*, 543 F.2d 1389 (D.C. Cir. 1976).

Lastly, when Salvato began his investigation, he reviewed the records of criminal cases in Campbell Circuit Court. When he came across a case where a felony had been reduced to a misdemeanor, or a PFO charge had been dismissed, he wrote "good case" on his investigative notes.

The clear implication here is that Salvato embarked on his investigation with a goal to present Respondent as an incompetent prosecutor, which is evidence of common law malice relevant to constitutional malice. *Compare* the famous case of *Goldwater* v. *Ginsburg*, 414 F.2d 324, 329 and n. 2 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), where the court held that similar "highly selective" notations on research materials identifying only derogatory information evidenced a preconceived motive to defame.

III. The Evidence Of Record, Believed By The Jury, Clearly And Convincingly Evidences Constitutional Malice.

The discussion hereafter clearly demonstrates that the case law on constitutional malice compellingly justifies the Kentucky Supreme Court's affirmance of the verdict for Respondent. When viewed together with the persuasive supporting evidence of common law malice discussed *supra*, the evidence in support of the jury verdict is overwhelming.

A. The "Ballard Gayhart" Libel.

The facts underlying the "Ballard Gayhart" libel (*see*, Pet. 37a) are quite clear — it did not occur as stated by Salvato in the November 17, 1984 article (Pet. 37a). Respondent did not meet with Gayhart *alone* in his office. *See* the testimony of Respondent (T. 159); and Robert Patton, counsel for Gayhart (T. 497). In fact, Petitioner Salvato admitted at trial that he could not remember whether the alleged coercive interview with Gayhart occurred "in court or whether it was in his office." (T. 451). At trial Salvato also stated he could not remember what he had said about the purported "interview" in the article (T. 451). He did, however, concede that he did not confirm the content of

Gayhart's serious charges (T. 450), which imputed to Respondent unprofessional and unethical behavior. When he was asked whether he informed Respondent about the Gayhart allegations during a subsequent interview, he stated inconsistently that he did ask Respondent about the allegation (T. 450), but that he did not remember what he said (T. 451). Later, under cross-examination as to the "unusual, unethical" nature of a prosecutor meeting with a criminal defendant absent the presence of counsel, the thrust of the story, Salvato stated that he thought that he had disclosed that counsel was present at the Gayhart "interview" — a fact admittedly disclosed to him by Gayhart (T. 451). Reliance on the statements of such a highly questionable source (Gayhart was an oft-convicted felon) without further independent investigation evidences reckless disregard of falsity. As the Court said in *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968), and reiterated in *Harte-Hanks*, 109 S.Ct. at 2686, "recklessness may be found where there are *obvious reasons to doubt the veracity of the informant or the accuracy of his reports*" (emphases supplied). It is clear that Gayhart — an older man with a prior record, serving a recently-imposed twenty year sentence, and facing revocation of probation in Ohio — so qualified and that Salvato was aware of these factors [T. 447] or related them in the story itself [Pet. 37a].

A great volume of decisional law was developed and applied the aforementioned *St. Amant* criterion to cases involving highly suspect sources. Thus, evidence of reckless disregard of falsity has been found where defendant relied on a source with a history of criminal deceit, *Pep* v. *Newsweek*, 553 F.Supp. 1080, 1092-1093 (S.D.N.Y. 1983), or dated hearsay from a notorious hoodlum, *Hinds* v. *Cowles Communications, Inc.*, 430 F.Supp. 1363, 1370 (N.D. Cal.

1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), or an informant with a history of bad check charges, *Butts*, 388 U.S. at 157, *St. Amant*, 390 U.S. at 732 and n. 3, *Harte-Hanks*, 109 S.Ct. at 2698, or a tabloid with a tendency to sensationalize and use anonymous allegations. *Mehau* v. *Gannett Pacific Corp.*, 658 P.2d 312, 322, 325 (Haw. 1983).

Such an investigatory deficiency in the presence of reliance on a "questionable source" "may tend to show that a publisher did not care whether an article was truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his sources." *Pep*, 553 F.Supp. at 1003. Indeed, in this case Salvato did not even conduct "the most perfunctory investigation" found insufficient in *Gertz* v. *Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982) [upholding an award of $400,000.00, including $300,000.00 in punitive damages], *cert. denied*, 459 U.S. 1226 (1983), in the face of obvious reasons to doubt the author-source.

Additionally, the conceded failure of Salvato to verify the serious charge of unprofessionalism with Gayhart's attorney also constitutes a failure to pursue an obvious source of corroboration and/or refutation. *Alioto*, 439 F.Supp. at 137. Indeed, the Court's decision in *Harte-Hanks* provides a striking parallel to Salvato's decision not to contact Gayhart's attorney. Here, as there, the focal issue was the credibility of the source but no contact was made with the one person who could have confirmed the underlying facts. Such a failure is "utterly bewildering" unless Salvato was "committed to running the story" —in such a case he had "good reason not to interview" him, as a denial "would quickly put an end to the story." *Harte-Hanks*, 109 S.Ct. at 2693.

Lastly, the absence of any mention of the presence of Gayhart's counsel at the alleged meeting, a fact Salvato conceded he had been informed of by Gayhart (T. 451), is itself highly probative of constitutional malice. Obviously, a story about a prosecutor negotiating with a criminal defendant through or in the presence of counsel is a commonplace scenario without which the criminal justice system would doubtlessly collapse. The only factor that makes the Gayhart "forced plea" — "ax over my head" aspect of the "Portrait of A Prosecutor" story newsworthy or useful to Salvato's thesis of Respondent as an incompetent and unethical prosecutor is the absence of Gayhart's counsel.

When Salvato consciously transformed the innocuous or bening into the defamatory and damning implication herein, the jury was permitted to find that such was sufficient evidence of reckless disregard of falsity by clear and convincing evidence. Thus, Salvato's deliberate omission of the reference to the presence of counsel may be a basis for liability since he "knowingly or recklessly misstated . . . evidence to make it more convincing or condemnatory than it is." *Westmoreland*, v. *CBS, Inc.*, 596 F.Supp. 1170, 1174 (S.D.N.Y. 1984).

B. The "Patchell" — "Crime After Crime" Libel.

> "HE TURNS THEM RIGHT BACK, AND THEY COMMIT CRIME AFTER CRIME. THEY COULDN'T HAVE A BETTER FRIEND.

The evidence concerning this headlined, dramatically depicted and patently defamatory quotation and its background are clear. The quote and this aspect of the story were attributed to David Patchell, a former narcotics officer. The story was printed despite specific knowledge of Salvato from information provided by Judge George Muehlenkamp,

who had, in the language of the Kentucky Supreme Court, "considerable experience" with Patchell (Pet. 6a), that Patchell was "a very poor police officer, totally unreliable" (T. 342). By contrast, Judge Muehlenkamp had indicated to Salvato that he had "no complaints" concerning Respondent — "he did a first class job" (T. 342). Aware that Salvato planned to use Patchell as a source, Respondent's Assistant Commonwealth Attorney, Kevin Quill, went to *The Kentucky Post* and Salvato before publication and tendered information from criminal files evidencing clearly that Patchell was unreliable. Both Salvato and *The Kentucky Post* refused to review the information (T. 894-95). Instead, the Petitioners published the headline and dramatic story of November 19, 1985.

At trial Salvato testified extensively, but without providing any significant information to substantiate the specific factual basis for the Patchell quotation. His attempt at citing examples (four) to support the "crime after crime" quotation is revealing. The listed examples provided nothing to justify the Patchell quotation. *See* the testimony of Kevin Quill (T. 1538-50). Salvato knew when he wrote this article that there were no cases of recidivism from Campbell County, since he had made a review of all criminal cases in Campbell Circuit Court going back several years at the inception of his investigation.

The law applicable to the above defamation clearly supports a finding that the published statements were made with reckless disregard of falsity. As stated above, the latter requirement is met "where there are *obvious reasons to doubt* the veracity of the informant or the accuracy of his reports." *St. Amant*, 390 U.S. at 732. (emphases supplied). In this case Salvato was informed by Judge Muehlenkamp who, as Salvato knew, was knowledgeable

about the Campbell County criminal justice system, that Patchell was "a very poor police officer, totally unreliable" (T. 342), while contemporaneously complimenting Respondent as dong a "first class job."

Additionally, Salvato's and *The Kentucky Post's* refusal to consider or review the evidence tendered to it demonstrating Patchell's non-reliability as a police officer is strong evidence of "an intent to avoid the truth." *Harte-Hanks*, 109 S.Ct. at 2698. The parallel to the latter decision is compelling. In that decision the defamed party tendered to defendants tapes of an interview that, like the information tendered here, was highly relevant to verifying the credibility of the primary source. *Id.* at 2693. If the Petitioners here were indeed interested in a fair and factual story, "truly in equipoise" in their investigation, *id.*, it is difficult to understand their refusal to peruse the materials Quill proffered. As a Court stated in *Harte-Hanks*, "one might reasonably infer . . . that the decision . . . was motivated by a concern they would raise additional doubts concerning [Patchell's] veracity." *Id.* at 2694. Instead, Petitioner's inexplicably, consciously ignored Quill's proffer of materials going to the core issue of Patchell's credibility as a source.

C. The Distorted Statistic Libels.

The uniform testimony of record compellingly evidences that the procedure for handling guilty pleas and possible reductions for all felonies (including persistent felony offender—PFO—charges) varies dramatically between Campbell and Kenton Counties.

Geographically, Campbell, Kenton and Boone Counties are located in the northernmost part of Kentucky, just

across the Ohio River from southwestern O! io (Hamilton County—Cincinnati) and southeastern Indiana.

In Kenton County plea nogtiations are initiated "very, very early" (T. 417) at "the initial stages" (T. 700) at a post-arraignment conference of the Kenton County Commonwealth Attorney and defense counsel at the District Court level (T. 812-16). If a plea is reached, an information is "tailored" and the reduction in felony and/or PFO charges is never reflected in Kenton County Circuit Court records (T. 414-18, 559-60, 681-85, 700, 812-18, 840-45, 1241, 1256). By striking contrast Campbell County (where Respondent is Commonwealth Attorney) does not "weed out" the weak cases referred to the Grand Jury by the District Court, but *only* negotiates following the issuance of a grand jury indictment (T. 146-47, 180-81, 238, 558, 684, 700, 948-50). In fact, the clear weight of the evidence is that plea negotiations are approximately equal in severity in both counties (T. 950), or, if any variance is discernable, slightly tougher in Campbell County (T. 558).

The "statistics" constructed by Salvato and reported in *The Kentucky Post* bear little resemblance to the accurate data presented at trial or to any criminal justice system operating within the realm of feasibility. For example, a brief perusal of the PFO rates table (#4) [Pet. 40a] reflects that the percentage of convictions in Kenton County was approximately 2000% of that in Campbell County in 1983; the percentage of dismissals in Campbell County for that year was over 600% higher than in Kenton County. Other years' statistics are only slightly less implausible. The other statistical table, "How felony cases are handled" (#5) [Pet. 40a], reflects that supposedly lenient Campbell County and supposedly harsh Hamilton County (Ohio) are roughly comparable in percentages of pleading guilty to the

charge in the indictment and pleading guilty to a lesser charge. However, both compare poorly with the incredibly favorable statistics in Kenton County.

Moreover, research by Salvato on Boone County records indicated that that county, led by a prosecutor Salvato deemed to be a prototypical "tough" prosecutor (T. 403), showed that, in the previous four years all but two PFO indictments were dismissed. (T. 386, 403-045, 445). Salvato admitted that he had been "frankly . . . shocked" by such figures (T. 445), but had not published the refutative information (T. 404). Did these facially improbable statistics based on selective use of acquired information lead Salvato or *The Kentucky Post* to double-check their statistics? The answer is "No." Indeed, Salvato seemed quite uninterested in verifying these figures. Salvato was offered the opportunity to peruse files in Respondent's office (T. 898), but did not make use of the informational opportunity (T. 141). Furthermore, monthly disposition sheets of all criminal cases in Campbell County Circuit Court were readily available in Bell's office (T. 546), as were state statistics from the Administrative Office of Courts by phone call (T. 542). Indeed, Salvato was provided with a set of official statistics from the latter, but did not use them (T. 898). Incongruously, he did rely on compiled statistics from the Court Clerk's office in Hamilton County and did not look at Court records. (T. 386). Concerned at the clear disinterest of Salvato as to these available, authoritative sources of information, Judy Clabes, the editor of *The Kentucky Post*, was advised of the concern that Salvato was ill-informed about statistics and was not going to provide an accurate picture of the real facts. She "somewhat sarcastically" stated that the story would be accurate. (T. 893).

The consensus testimony of the record persuasively demonstrates that the above statistics are not only facially improbable, but also that any such comparison between Kenton and Campbell Counties is unfair, invalid, and misleading (T. 180-81, 238, 554-564, 612-614, 948-50).

Salvato admittedly knew of this difference (T. 391-392) and had told Mike Phillips, the managing editor, of it. (T. 1059, 1141). As in *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 253 (1974), Salvato "must have known" from his own awareness of the major differences in the Campbell and Kenton criminal justice systems that the defamatory statements resulting from the "apples and oranges" comparison, to use Professor Robert Lilly's evocative expression (T. 558), were deliberately false.

The black letter law clearly concludes that a defendant "cannot feign ignorance or profess good faith where there are clear indications present which bring into question the truth or falsity of defamatory statements." *Gertz*, 680 F.2d at 538. More specifically, "an inference of actual malice can be drawn when a defendant publishes a defamatory statement that contradicts information known to him, even though the defendant testifies that he believes that the statement was consistent with the facts within his knowledge." *Hunt* v. *Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983).

In the powerful language of *Schiavone Constr. Co.* v. *Time, Inc.*, 847 F.2d 1069, 1092 (3rd Cir. 1988), the court concluded that the *New York Times* standard can be met "(w)here the defendant finds internal inconsistencies or apparently reliable information that contradicts its libelous assertions but nevertheless publishes these statements anyway" and chooses to delete information that would present the true scenario in "a very different and more benign light . . ." *Id.* at 1090-92.

In addition to the undoubted, knowingly misleading use of the statistical comparison discussed in detail above, Salvato also transposed the figures relating to jury trial conviction rates for *two consecutive years* (T. 460, 1191), which dramatically and radically reversed the significance of the simple mathematical data that even an elementary school student could have dealt with competently and efficiently. (Salvato compared Kenton and Campbell for four years. In two of those years, Campbell had 12 guilty and 4 not guilty verdicts in 1981, and 9 guilty and 3 not guilty in 1982. Salvato transposed these figures to obtain results which made it appear that Ball lost about half of his cases, while Kenton County lost only about 30% of its cases. If the figures were correctly compiled, Ball's record would have been better than Kenton's.)

Had the simple figures not been transformed, they would have been useless to Salvato. Indeed, the correct figures would have undermined, probably irreparably, the picture Salvato was endeavoring to paint in the article. Salvato's testimony attempted to portray this double transposition as mere negligent, good faith miscalculation (T. 460-61, 1991). However, the jury was not required to buy Salvato's testimony. As the Court has trenchantly stated, defendant "cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." *St. Amant*, 390 U.S. at 732.

D. The "Scores Of Delays" Libel.

Despite the highly pejorative nature of this libel, imputing unethical dilatoriness and impingement of criminal defendants' rights to a speedy trial, Salvato's testimony

viewed as a whole, lacks credibility, as the jury apparently concluded. Salvato initially testified that he was unable to define "scores," but ultimately conceded that a "score" could be defined as "twenty" (T. 454). In fact, he admitted that this word was consciously used instead of less damaging and condemnatory alternatives. (T. 454). Salvato then testified that the continuances were sought and received by the Commonwealth and defendants' counsel on an "equal basis" (T. 454-55). He conceded that his chart (Pet. 41a) "suggested strongly" that "these delays" were attributable *only* to the Commonwealth's Attorney's continuances (T. 456). The evidence on cross-examination and otherwise during the trial indicates clearly that the "scores of delays" libel was without basis. Respondent testified that he had "very little input" into trial scheduling and that this was under the "complete control" of the Circuit Court Judge (T. 156-58). Judge Muehlenkamp stated that Respondent "very, very rarely" sought continuance, but that he received "frequent requests" from defense counsel. He further testified that he "controls" the court calendar, that Respondent's office functioned in an "excellent" fashion, and that he had informed Salvato during an interview that Respondent's office did "a first class job" and that he had "no complaints" regarding its performance (T. 339-40).

Circuit Judge Leonard Kopowski likewise rejected any suggestion of "dilatory" conduct or "frequent" delays by Respondent's office (T. 722), as did former Circuit Judge Thomas Schnorr, who stated the continuances by the Commonwealth's Attorney's office were so "rare" he could not remember any "specific" example thereof (T. 962). The only other testimony by participants in the criminal justice system—by Respondent's assistant (T. 874-75) and a defense counsel (T. 958)—similarly concluded that no fre-

quent or unnecessary delays were sought by Respondent's office. By contrast, Salvato's testimony is highly revealing. He cited as support for his libelous statement "some records that I don't have" — he testified he did not know where the notes or records on delys by Respondent's office and criminal defense counsel were. He "may have" lost them (T. 455-56). Salvato conceded that he had been directed to bring them to trial for use in conjunction with his cross-examination. His only other cited source was a former Circuit Court Judge (T. 453) whose testimony was not adduced at trial. He conceded Respondent had told him he never "unnecessarily delayed" cases (this was quoted in the article) (T. 457) and he admitted he knew that the two Circuit Judges had been ill during the period in question (T. 458). However, he adhered to the position that the delay problem was due to Respondent's office (T. 458).

In the course of his interviews with Judges Muehlenkamp and Kopowski, Salvato also failed to ask them about continuances granted at the request of Ball's office. If he had, the "Scores of Delays" story would have gone down the tube.

The above summary evidences clearly and convincingly that Salvato deliberately conveyed a false impression attributing the delay "problem" to the Respondent. His deliberate choice of the word "scores" and his admission that his story and chart "suggested strongly" that the Commonwealth's Attorney's office was the cause of unnecessary delays is clearly qualitatively different from the admitted facts.

The law is clear. A jury may find reckless disregard of falsity where a reporter "knowingly or recklessly misstates that evidence to make it seem more convincing or

condemnatory than it is." *Westmoreland*, 596 F.Supp. at 1174.

The case law clearly allows a jury to infer reckless disregard where documents or notes are purposefully withheld or destroyed in bad faith. *Brown & Williamson Tobacco Co.* v. *Jacobson*, 827 F.2d 1119, 1134-36 (7th Cir. 1987). [The jury may draw the inference such evidence would have "seriously damaged" defendants' libel defense], *cert. denied*, 485 U.S. 993 (1988).

A review of the evidence delineated in detail above also suggests that there was no objective or even colorable basis for the "scores of delays" libel, that the damaging "scores of delays" libel was "fabricated by the defendant . . . the product of his imagination . . ." *St. Amant*, 390 U.S. at 732.

Viewed in the best possible light for Petitioners, the "scores of delays" libel was at least published in reckless disregard of falsity. Salvato acknowledged he knew the two judges were ill during the period in question, he knew Respondent denied unnecessary delays and attributed such to judicial illnesses, and he knew that Judge Muehlenkamp had been highly complimentary of the operation of Respondent's office. Yet, in the face of such contradicting evidence he imputed to Respondent's office extreme dilatoriness in prosecuting cases— ignoring his own research that, if delays occurred, they were attributable *equally* to both prosecutors and defense counsel. Publication of such a serious charge with notice of probative, contradictory information "warrants submission to the jury of the question of whether [defendants] acted with reckless disregard of the falsity thereof." *Levine* v. *CMP Publications*, 738 F.2d 660, 675 (5th Cir. 1984).

E. The "Cinema X" Libel.

"Police say Ball was not involved in that (Cinema X) investigation, despite a request from Twehues." Paul Twehues was County Attorney for Campbell County, prosecuting misdemeanors, while Ball was Commonwealth's Attorney prosecuting felonies. Cinema X was a porno theater in Newport, which fell under Twehues' jurisdiction. There was much public pressure to close Cinema X, and to rid Newport of its old "Sin City" image. Clearly, Petitioners' article was calculated to take advantage of the prevailing climate of public sensitivity on issues of public corruption.

In this context this extremely damaging suggestion of deliberate dereliction of duty carried the worst possible connotation, indicating the need for careful verification. The testimony adduced at trial clearly refutes any suggestion such a "refusal" ever occurred. Respondent testified no "request" was ever made, but that he in fact assisted Mr. Twehues, the County Attorney, through the grand jury process. Twehues wrote Ball a letter of thanks, and Salvato received a copy of it (T. 169-71.) The testimony of Respondent's assistant, Kevin Quill, confirms the receipt thereof by Salvato and that he "kind of threw them (the letter and another item) on the desk" (T. 896). When asked about his sources for the "refusal" statement, Salvato testified: "I think Mr. Twehues and backed up by Mr. Hetteberg" (T. 489). The purported latter source did not testify.

Mr. Paul Twehues testified that he told Salvato that he had always had "a good working relationship" with Respondent's office and that the statement attributed to him— "Twehues said that Ball could have asked a grand jury to compel the theater and book store owners to present evi-

dence of ownership before trial"—was made in the "context" of a discussion of the "special" grand jury that *had been empaneled*, with Ball's help. Salvato had asked Twehues whether a "special" grand jury was required or whether a "regular" grand jury was sufficient (T. 672-73).

Publication of the "refusal" statement in the face of Twehues' letter constitutes, at worst, a sheer fabrication, or at best reckless disregard of falsity. Indeed, the treatise written by Petitioners' Counsel of Record, Bruce Sanford, states the applicable rule succinctly:

> When a defendant has ignored credible information that disputes the accuracy of its publication, courts have found that it may have acted with actual malice.

B. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* 331 (1985).

CONCLUSION

As Chief Justice Warren said, "Freedom of press under the First Amendment does not include absolute license to destroy lives or careers." *Butts*, 388 U.S. at 170.

Although underlying facts are not subject to independent de novo review, under *Harte-Hanks*, that issue is not presented in this case, since the salient underlying facts are largely undisputed, to wit:

> Salvato was thrown out of the Bellevue football game by Bellevue Police officer Joe Chandler.
>
> Salvato was disappointed when the investigation into the Bellevue Police Department, which he instigated, failed to produce indictments.
>
> When Salvato began his "investigation" he reviewed the criminal case records in Campbell Circuit Court, and when he found a case where a felony was reduced

to a misdemeanor, or a PFO was dismissed, he marked in his notes that is was a "good case."

There was a significant difference in the way felony cases were handled in Kenton and Campbell Counties, which Salvato knew.

The delays in jury trials were due to illnesses of the two Circuit Judges, not because Ball asked for scores of continuances.

Salvato did not ask the sitting Circuit Judges about continuances granted at the request of Ball's office, though the interviewed both of them.

Salvato failed to produce any records substantiating his "scores of delay" story, although he was requested to do so.

Salvato, wittingly or carelessly, transposed trial success statistics so they falsely portrayed that Ball's office was much less successful at trial than Kenton County, when the true statistics that Salvato had compiled showed that Ball's record was as good as or better than Kenton County.

Salvato published and headlined the David Patchell quote without having any statistical or other supporting documentation.

Salvato and the Post refused to review proffered material relating to Patchell's unreliability.

Salvato was told by Judge Muehlenkamp that Patchell was unreliable.

Salvato quoted Ballard Gayhart impugning Ball's ethical conduct, knowing Gayhart was a convicted felon, without so much as interviewing Gayhart's lawyer, without asking Ball about it, and even though he knew that Gayhart's lawyer was present in this plea bargaining session.

Salvato was given a letter from County Attorney Paul Twehues to Ball, thanking Ball for his assistance in the Cinema X Grand Jury proceedings.

Based on these underlying facts and inferences which may be drawn therefrom by the jury, none of the articles would have been newsworthy, nor would they have supported the "Portrait of a Prosecutor" theme that Louis Ball was an incompetent official. It is quite clear that Salvato and the *Kentucky Post* embarked on this shameful and malicious attack simply to "get" Ball, letting the devil take the hindmost.

Constitutional actual malice was clearly and convincingly demonstrated, not only to the jury, but to the de novo scrutiny of the Kentucky Supreme Court in a unanimous decision. As the Supreme Court of Kentucky stated in its opinion (Pet. 2a): *The prominence of the defamatory material displayed in the articles in question can only be appreciated by viewing the newspaper as printed.*

The tardy attack on jury instructions is simply not supported by any previous decisions. Furthermore, the instructions were in full accord with Kentucky law. Accordingly, the Petition should be denied.

Respectfully submitted,

FRANK V. BENTON III
BENTON, BENTON & LUEDEKE
18 North Fort Thomas Avenue
Fort Thomas, Kentucky 41075
606/781-2345

Attorneys for Respondent

Response written in collaboration with
Professor David Andrew Elder
Admitted to U.S. Supreme Court 9/13/76

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PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE W. SANFORD
Counsel of Record
LEONARD H. FREIMAN
ANNE R. NOBLE
MATTHEW G. WEBER
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1500

RICHARD G. MEYER
DETERS, BENZINGER & LA VELLE
2701 Turkeyfoot Road
Covington, Kentucky 41017
(606) 341-1881

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
CONCLUSION	6

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* Petitioner the E.W. Scipps Co. has no parent companies or partially-owned subsidiaries. Petitioner *The Kentucky Post* is published by Scipps Howard, Inc., a wholly-owned subsidiary of the E.W. Scripps Co.

TABLE OF AUTHORITIES

CASES:	Page
Ball v. Kentucky Post, 801 S.W.2d 684 (Ky. 1990)	5
Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967)	1,3
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	2
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)	2
Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984)	3
Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990)	2,6
Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971)	3
Young v. J.B. Hunt Transportation, Inc., 781 S.W.2d 503 (Ky. 1989)	4

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I.

Respondent's expansive liberties with the record below necessitate a brief reply.

First and foremost is the over-arching premise of Respondent's brief that this case involves accusations of reputation-crushing magnitude. *See, e.g.*, Respondent's Opposition to Petition for Writ of Certiorari at page 25 ("Opp. at ___ "), *quoting Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring) ("Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers"). No such accusations were made. No lives were destroyed, no ca-

reers ruined. Since the publication of Petitioners' autumn 1984 evaluation of Respondent's public performance ("the series"), Respondent has *twice* been reelected to his position as Commonwealth's Attorney, both times without opposition.

The *worst* Respondent can say about the series is (1) that it somehow "imput[ed]" to him "unethical dilatoriness," (2) that its "theme" was that Respondent "was an incompetent official," and (3) that it included the hyperbolic rhetoric of a disenchanted ex-policeman, who said that criminals in Ball's jurisdiction "couldn't have a better friend." *See* Opp. at 20, 27 and 14, respectively. The publication of such "facts" and opinions does not show, as Respondent grandiloquently suggests, that Petitioners "embarked on [a] shameful and malicious attack simply to 'get' [Respondent], letting the devil take the hindmost." Opp. at 27. Nor, Respondent's bombast to the contrary, do such "facts" and opinions amount to the sort of scurrilous attack typical of the libel cases that have been heard by this Court. For the history of constitutional jurisprudence consists almost exclusively of libel cases where the plaintiff's reputation was damaged by accusations of crime or other highly defamatory conduct. *See, e.g., Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990) (high school wrestling coach accused of lying under oath); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (candidate for judgeship accused of bribery and blackmail); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (attorney representing family of murder victim accused of participating in a "frame-up" of the murderer, of being part of a communist conspiracy to discredit police officers, and of having a lengthy crim-

inal record); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971) (mayor and candidate for office of county tax assessor accused of having been charged with perjury in a federal court); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (athletic director for the University of Georgia accused of fixing a football game between Georgia and the University of Alabama).

Nothing in the series accuses Respondent of illegal activities, malfeasance, or of any wrongdoing whatsoever. Indeed, at most, the series says neither more nor less than what many citizens of Campbell County had believed for years: that Respondent's performance as Commonwealth's Attorney had been uninspired and lackluster. *See* Petition for Writ of Certiorari at 31a - 59a ("Pet. at ___ ").

II.

Respondent mischaracterizes the required use of special interrogatories as a "novel, if not radical" proposal. Yet Kentucky (like many other states) already has mandated the use of special interrogatories in certain types of cases. *See, e.g., Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984) (requiring special interrogatories in cases governed by the comparative negligence rule). Additionally, the benefits of special interrogatories have been explained by the Kentucky Supreme Court, most recently in the case curiously cited by Respondent to support his argument that their mandatory use would bring about a "radical transformation in Kentucky law":

> Since rendition of our decision in *Baxter v. Tankersley*, [416 S.W.2d 737 (1967)], this court has abandoned contributory negligence

> as a complete bar to recovery and adopted in its place certain provisions of the Uniform Comparative Fault Act. *We have directed submission of special interrogatories to the jury* to ascertain its *precise findings* as to total damages due plaintiff without regard to his fault, and the percentages of total fault attributable to plaintiff and defendant. [Citation omitted]. The use of special interrogatories has been encouraged in negligence cases involving multiple parties. [Citation omitted]. Under present law, the decision-making required of a jury (*eight separate findings in this case*) is considerably more complex than it was under former law. . . . We now require specific findings on a number of issues . . . .

Young v. J.B. Hunt Transportation, Inc., 781 S.W.2d 503, 504-05 (Ky. 1989) (emphasis added). *Compare* Pet. at 16-18. The use of special interrogatories, in fact, conforms with Kentucky's "traditional posture as to use of 'bare bones' instructions . . . . " Opp. at 3 *quoting Young*, 781 S.W.2d at 506. This is because, as the *Young* court made clear, "To attempt by instructions to fine-tune the deliberations of the jury would necessarily result in confusion, coercion of reluctant jurors and permit strong-willed jurors to exercise undue influence upon the proceedings." 781 S.W.2d at 505. *See* Pet. at 15 n.14.

Respondent's own brief demonstrates why special interrogatories should be constitutionally required in public official libel trials. For example, in his Opposition, Respondent continues to excoriate Petitioners for what he characterizes as the "Cinema X Libel."

See Opp. at 24-25. But in its opinion, the Kentucky Supreme Court held that Petitioners' comments about Respondent's handling of the investigation into that pornographic theatre were "derogatory, *but hardly defamatory*." *Ball v. Kentucky Post*, 801 S.W.2d 684, 686 (Ky. 1990) (emphasis added). Neither Petitioners nor Respondent (nor, indeed, the Kentucky Supreme Court itself) have any way of knowing whether the jury rendered its verdict in favor of Respondent on the basis of this *non-defamatory* article or not. As a result, neither Petitioners nor Respondent (nor the Kentucky Supreme Court) have any discernible way of knowing whether the jury rendered its verdict on permissible or impermissible grounds. The use of special interrogatories, of course, would have rendered this question moot.

Yet despite the court's ruling, Respondent continues to claim that a description of his less than spectacular handling of this matter—a description which was based on several interviews with reputable sources—"constitutes, at worst, a sheer fabrication, or at best reckless disregard of falsity." Opp. at 25. So, here we have a Respondent who would rail against, and base his argument on, a part of the series that the Kentucky Supreme Court found not to be defamatory.

Likewise, an entire heading in Respondent's brief is devoted to assuring this Court that the decision of the Kentucky Supreme Court below was sound when it was based on the statement that: " 'HE TURNS THEM RIGHT BACK, AND THEY COMMIT CRIME AFTER CRIME. THEY COULDN'T HAVE A BETTER FRIEND.' " Opp. at 14. (Capitalization supplied). Nothing could be clearer from this Court's

ruling in *Milkovich* than that such statements of indisputably pure rhetoric are constitionally nonactionable. *Milkovich*, 110 S. Ct. at 2704-05 *citing Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970). Yet, without benefit of special interrogatories, no one can know whether the jury below impermissibly awarded damages to Respondent on the basis of this hyperbole.

CONCLUSION

At bottom, Respondent's Opposition, like the Kentucky Supreme Court's opinion, seeks to blur the record and distract this Court's attention away from the stark reality that a state has imposed damages on a newspaper for evaluating the performance of a public official and has done so without evidence of substantial falsity linked to knowledge of that falsity linked to damages arising from it. As a result, the Kentucky Supreme Court's decision should be reversed.

Respectfully submitted,

BRUCE W. SANFORD
Counsel of Record
LEONARD H. FREIMAN
ANNE R. NOBLE
MATTHEW G. WEBER
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1500

RICHARD G. MEYER
DETERS, BENZINGER & LA VELLE
2701 Turkeyfoot Road
Covington, Kentucky 41017
(606) 341-1881

Counsel for Petitioners